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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 97

THE UNITED STATES OF AMERICA, APPELLANT

vs.

BEN KAPP, BERT COX, TOM WOODS, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED MAY 29, 1937

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INDEX

	Original	Print
Record from D. C. U. S., Western Oklahoma	1	1
Indictment	1	1
Demurrer of Ralph McLarty to Indictment	20	15
Demurrer of Bert Cox, Lee Hopper, Tom Woods, and L. L. Green to Indictment	21	15
Opinion on Demurrers to Indictment, Vaught, J	27	19
Order Sustaining Joint and Separate Demurrers to Indictment and Dismissing case as to all Defendants	30	20
Petition for Appeal	31	21
Assignments of Error	38	21
Order Allowing Appeal	40	22
Citation on Appeal and Acknowledgment of Service [omitted in printing]	43	23
Praecipe for Transcript of Record	46	23
Election as to Printing of Record	48	24
Clerk's Certificate to Transcript [omitted in printing]	49	24
Statement of points to be relied upon and designation as to printing record	51	24

1 In United States District Court for the Western District of Oklahoma

No. 11379–Cr.

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

BERT KAPP, BERT COX, TOM WOODS ALIAS T. C. WOODS, RALPH MCLARTY ALIAS RALPH MCCLARDY, LEE HOPPER, AND L. L. GREEN, ALIAS LINDSEY GREEN, DEFENDANTS

Indictment (Violation: Section 88, Title 18, U. S. C. A.)

Filed Nov. 29, 1935

At the January 1935 Term of the District Court of the United States for the Western District of Oklahoma, begun and held at the city of Oklahoma City in said District, on the 1st Monday of January in the year of our Lord one thousand nine hundred thirty-five the Grand jurors of the United States of America, within and for said District, having been duly summoned, impaneled, sworn, and charged to inquire into and true presentment make of all public offenses against the laws of the United States of America, committed within said District in said State of Oklahoma, upon their oaths aforesaid, in the name and by the authority of the United States of America, do find and present:

2 FIRST COUNT

That heretofore, to-wit: on or about the 1st day of September 1933, and thence continuously thereafter until the return of this indictment, in Oklahoma City, Oklahoma County, in the Western District of the State of Oklahoma, and within the jurisdiction of this Court, at Westville, Adair County, at McAlester, Pittsburg County, at Okmulgee, Okmulgee County, all in the State of Oklahoma, and at Chicago, Cook County, in the State of Illinois, and at divers other places to the Grand Jurors unknown and hence not herein stated, Ben Kapp, Bert Cox, Tom Woods alias T. C. Woods, Ralph McLarty alias Ralph McClardy, Lee Hopper, and L. L. Green alias Lindsey Green, whose more full, true, and correct names are to the Grand Jurors unknown, did unlawfully, wilfully, knowingly, and feloniously combine, confederate, conspire, and agree together and with each other and with divers other persons whose names are to the Grand Jurors unknown and hence not herein stated, to commit, during the period of time from about the 1st day of September 1933, and continuously thereafter up to and including the date and return of this indictment, a certain offense or offenses against the United States of America, that is to say, violate Section 37 of the Penal Code (Section 88, Title 18, U. S. C. A.), to defraud the United States by violating the

provisions of the Act of Congress approved May 12, 1933, known as Public Act No. 10, of the 73d Congress, entitled "An Act to Relieve the Existing National Economic Emergency by increasing Agricultural Purchasing Power, to Raise Revenue for Extraordinary Expenses Incurred by Reason of such Emergency, to Provide Emergency Relief with Respect to Agricultural Indebtedness, to Provide for the Orderly Liquidation of Joint Stock Land Banks, and for other purposes", and especially Sections 2 and 8 of said Act, now designated Sections 602 and 608, of Title 7, U. S. C. A., and the rules and regulations made and promulgated by the Secretary of Agriculture of the United States to carry out the powers invested in him by said Act; and further to defraud the United States by impairing, obstructing, and defeating the lawful functions of the Secretary of Agriculture in administering and carrying out the powers and duties conferred upon him under the provisions of the aforesaid Act;

3. That the United States was at all times alleged in this indictment making plans to purchase and purchasing pigs from producers under the provisions of said Act, and to make benefit payments under said Act, and that for the purpose of assuring that the benefit payments under said Act would reach the producers the Secretary of Agriculture promulgated on August 21, 1933, rules and regulations to the effect as follows:

"Hogs owned, consigned, or 'planted' by registered market yard traders or speculators are not eligible to benefit payments."

"Name and address of owner of hogs declared eligible to benefit payments, must be furnished processor."

and on September 1, 1933, the said Secretary of Agriculture promulgated further rules and regulations to the effect as follows:

"Beginning Tuesday morning, September 5, no pigs will be purchased for the account of the Secretary of Agriculture unless permission has been granted authorizing the shipment.

"Permits must be secured from authorized processors through commission firms operating at authorized processing points or directly from authorized packers in cases where pigs will be shipped directly to authorized packers. However, pigs may be handled for individual farmers by cooperative shipping associations or by country buyers, providing the farmer supplies with the pigs a letter or telegram constituting the permit authorizing the shipment. Cooperative shipped associations or country buyers also may act on behalf of the original owners in securing permits but the permits must be granted in the name of the original owners.

"Permits obtained, beginning Tuesday, September 5, through commission firms or authorized packers are to be evidenced by letter or telegram to the original owner.

"Beginning immediately, no permits are to be issued by commission firms or by authorized packers to any one other than the original owner of the pigs. In no case are permits to be issued to any one owner for more than 200 head."

which said rules and regulations were in full force and effect during all the dates and times set forth in this indictment, as the defendants then and there well knew.

That is to say, it was the purpose and object of said conspiracy and of said conspirators, and each and all of them, that they,
4 the said Ben Kapp, Bert Cox, Tom Woods alias T. C. Woods, Ralph McLarty alias Ralph McClardy, Lee Hopper, and L. L. Green alias Lindsey Green, should then and there falsely and fraudulently make certain false statements and misrepresentations, with intent to defraud the United States of America and the Secretary of Agriculture of the United States of America, whereby there would be shipped and transported to Rice Brothers, and the Quinn Commission Company, at Chicago, in Cook County, Illinois, for sale to the Secretary of Agriculture and the United States of America, in violation of said rules and regulations promulgated by the Secretary of Agriculture, certain pigs which the said defendants, Tom Woods, Ralph McLarty, Lee Hopper, and L. L. Green, had purchased and would purchase from farmers and producers of pigs in the State of Oklahoma and elsewhere, the exact places being to the Grand Jurors unknown, and said defendants would indicate and disclose, represent and state that the pigs so shipped would be the property of various producers other than the defendants, and which said pigs, when so shipped to the said Rice Brothers and the Quinn Commission Company at Chicago, Illinois, would be sold by them to the United States of America at the premium price to be paid for said pigs under the rules and regulations promulgated by the Secretary of Agriculture hereinabove set forth, and which said pigs would, in truth and in fact, be owned by and be the property of the said Tom Woods, Ralph McLarty, Lee Hopper, and L. L. Green, defendants herein;

That it was the purpose and object of said conspiracy and of said conspirators and each and all of them that they, the said Ben Kapp, Bert Cox, Tom Woods alias T. C. Woods, Ralph McLarty alias Ralph MClardy, Lee Hopper, and L. L. Green alias Lindsey Green, should then and there falsely and fraudulently make certain false statements and misrepresentations, with intent to defraud the United States of America and the Secretary of Agriculture of the United States of America; that they, the said defendants, would state and represent that producers, persons other than the defendants, were the original owners and producers of the pigs that would be shipped and transported and sold to the Secretary of Agriculture of the United States of America when, in truth and in fact, they,
5 the said defendants and each of them, knew that the said pigs were the property of and were owned by the said defendants, Tom Woods, Ralph McLarty, L. L. Green, and Lee Hopper, and were not at that time the property of the original producer thereof, and said defendants and each of them, then and there, well knew that the said defendants, Tom Woods, Ralph McLarty, L. L. Green, and Lee Hopper were not entitled to receive premium prices for said pigs so sold and owned by them, the said Tom Woods, Ralph Mc-

Larty, L. L. Green, and Lee Hopper, under the rules and regulations above set forth, promulgated as aforesaid by the Secretary of Agriculture aforesaid;

That at all the times in this indictment mentioned, the said defendant, Ben Kapp, was and for a long time prior thereto had been a registered trader on the Oklahoma City Livestock Market under the trade name of "Kapp & Company", with offices in the Livestock Exchange Building, in Oklahoma City, Oklahoma, and also during that time was registered under the Packers and Stockyards Act as a trader; and that the said defendant, Bert Cox, was at all the times mentioned in this indictment and for a long time prior thereto had been a registered trader on the Oklahoma City Livestock Market as a commission firm and was registered under the Packers and Stockyards Act as a commission firm and market agency under the firm name of "Cox-Noel Commission Company" with offices in the Livestock Exchange Building, at Oklahoma City, Oklahoma; and that it was a part of the said conspiracy that Bert Cox and Ben Kapp would and by using their influence through commission firms on the Chicago, Illinois, Livestock Market, secure permits for the shipment of pigs to that market for sale to the Secretary of Agriculture at premium prices by the defendants Tom Woods, Ralph McLarty, L. L. Green, and Lee Hopper, knowing that these defendants, Tom Woods, Ralph McLarty, L. L. Green, and Lee Hopper, were not producers of pigs and that the pigs which they would ship on the permits to be secured by the said defendants, Bert Cox and Ben Kapp, were not the property of original producers;

That it was further intent and purpose of the said defendants and each of them, and a part of said conspiracy, that the said defendants Tom Woods, Ralph McLarty, L. L. Green, and Lee Hopper, would furnish Rice Brothers and the Quinn Commission Company,
6 of Chicago, Illinois, false information as to the actual ownership of the pigs to be contained in each shipment sent to these firms and to thereby cause representatives of those commission firms, acting as their agents in the sale of these pigs to the Secretary of Agriculture, to give false information and make false statements to representatives of the Secretary of Agriculture leading such representatives of the Secretary of Agriculture to believe that said pigs were being bought by said Secretary of Agriculture from the original producers thereof and that they were, therefore, eligible to the benefit payments provided for under the rules and regulations above set forth;

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that at the hereinafter said times, in pursuance of, in furtherance of, in execution of, and for the purpose of carrying out and to effect the object, design, and purpose of said conspiracy, the hereinafter named defendants, herein indicted, did unlawfully, wilfully, knowingly, and feloniously, at the several times and places hereinafter mentioned in connection with their names, the several overt acts hereinafter specified:

OVERT ACTS

1. That on or about September 2, 1933, at Oklahoma City, Oklahoma, the defendant Ben Kapp wired Sam J. Acker, of Rice Brothers, Chicago, Ill., for permits for two double decks in the name of Lee Hopper.

2. That on or about September 4, 1933, at Oklahoma City, Oklahoma, the defendant Ben Kapp wired Rice Bros., of Chicago, Illinois, relative to pig permit for Lee Hopper.

3. That on or about September 5, 1933, at Oklahoma City, Oklahoma, the defendant Ben Kapp wired Rice Bros., of Chicago, Illinois, asking for permit for Ralph McClardy.

4. That on or about September 7, 1933, at Oklahoma City, Oklahoma, the defendant Ben Kapp wrote to Sam J. Acker, of Rice Bros., Chicago, Ill., directing disposition of the proceeds from shipments of pigs by Lee Hopper and Ralph McLarty.

7 5. That on or about September 6, 1933, at Oklahoma City, Oklahoma, the defendant Ben Kapp wired Rice Bros., at Chicago, Illinois, advising shipment of two double decks McClardy pigs.

6. That on or about September 8, 1933, at Westville, Oklahoma, Tom Woods shipped six (6) carloads of pigs, consigned from T. C. Woods to the Quinn Commission Co., Chicago, Illinois, in cars K. C. S. 3024, 30372, 30213, 30117, and 30264, under K. C. S. waybills Nos. 1, 2, 3, 4, 5, and 6.

7. That on or about September 11, 1933, at Westville, Oklahoma, Tom Woods addressed a letter to J. E. Quinn Commission Company, at Chicago, Illinois, enclosing signed statements purporting to be authorizations from each farmer who owned pigs in the shipments set out in Overt Act No. 6.

8. That on or about September 11, 12, 13, and 14, 1933, the defendant Tom Woods caused 1,651 of the pigs shipped, as set out in Overt Act No. 6, to be sold to agents of the Secretary of Agriculture at premium prices.

9. That on or about September 9, 1933, at Okmulgee, Oklahoma, the defendant Ralph McLarty shipped two (2) carloads of pigs to Rice Bros., of Chicago, Illinois, for sale to the Secretary of Agriculture, in cars S. L. S. F. 47362 and 47348, under S. L. S. F. waybills Nos. 212 and 213.

10. That on or about September 16, 1933, the defendant Ralph McLarty caused to be sold to agents of the Secretary of Agriculture, at Chicago, Illinois, at premium prices, 464 of the pigs contained in the shipment set out in Overt Act No. 9.

11. That on or about September 9, 1933, at Okmulgee, Oklahoma, the defendant Ralph McLarty mailed to Rice Bros., Chicago, Illinois, statements alleged to have been signed by the farmers owning pigs in shipments set out in Overt Act No. 9.

12. That on or about September 5, 1933, the defendant Bert Cox, at Oklahoma City, Oklahoma, arranged with the defendant Ben Kapp

to secure a permit for a shipment of pigs, for sale to the Secretary of Agriculture at Chicago, Illinois, by Ralph McLarty.

8 13. That on or about September 7, 1933, at Oklahoma City, Oklahoma, the defendant Bert Cox received from the defendant Ralph McLarty remuneration for securing the permit as set out in Overt Act. No. 12.

14. That on or about September 4, 1933, at Oklahoma City, Oklahoma, the defendant Bert Cox arranged through the defendant Ben Kapp to secure permits for the sale of pigs to representatives of the Secretary of Agriculture at Chicago, Illinois, by Tom Woods.

15. That on or about September 14, 1933, at Oklahoma City, Oklahoma, the defendant Bert Cox received from the defendant Tom Woods remuneration for securing permits arranged for by him, as set out in Overt Act No. 14.

16. That on or about September 8, 1933, at Oklahoma City, Oklahoma, the defendant L. L. Green arranged with the defendants Bert Cox and Ben Kapp to secure a permit entitling him to ship a carload of pigs to Chicago for sale to the Secretary of Agriculture.

17. That on or about September 8, 1933, the defendant L. L. Green delivered his check, in the sum of $50.00, to the defendant Ben Kapp, at Oklahoma City, Oklahoma, in payment for the securing of permit, as set out in Overt Act No. 16.

18. That on or about September 8, 1933, at Lamar, Oklahoma, L. L. Green caused to be shipped two carloads of pigs to the Quinn Commission Co., Chicago, Illinois, for sale to the Secretary of Agriculture.

19. That on or about September 16, 1933, L. L. Green caused Rosenbaum Bros., at Chicago, Illinois, to sell to Wilson & Company, to the account of the Secretary of Agriculture, 253 of the pigs shipped by him, as set out in Overt Act No. 18.

20. That on or about September 8, 1933, the defendant L. L. Green, at Lamar, Oklahoma, mailed to J. E. Quinn Commission Company, Chicago, Ill., statements alleged to have been signed by owners of the pigs contained in shipment, as set out in Overt Act No. 18.

9 21. That on or about the 2nd day of September 1933 the defendant Lee Hopper arranged with the defendant Bert Cox to secure through the defendant Ben Kapp a permit for a shipment of pigs to Chicago, Illinois, for sale to the Secretary of Agriculture.

22. That on or about September 11, 1933, the defendant Lee Hopper paid, through the First National Bank of McAlester, Oklahoma, a draft for $26.00 drawn on him by the Cox-Noel Commission Company to cover charges connected with procuring permits for the sale of pigs to the Secretary of Agriculture.

23. That on or about September 7, 1933, at McAlester, Oklahoma, the defendant Lee Hopper mailed to Rice Bros., at Chicago, Illinois, certificates of ownership purporting to have been signed by owners of the pigs which he was shipping on that date.

24. That on or about September 7, 1933, at McAlester, Oklahoma, the defendant Lee Hopper caused to be shipped to Rice Bros., Chicago, Illinois, four (4) carloads containing 763 pigs for sale to the Secretary of Agriculture, said pigs being loaded in cars T. P. 22052, 22325, 22275, and M. K. T. 46865, under M. K. T. waybills No. 24, 25, 26, and 27.

25. That on or about September 13, 1933, the defendant Lee Hopper caused Rice Bros., at Chicago, Illinois, to sell to Guggenheim Bros. and Armour & Company, for the account of the Secretary of Agriculture, 753 of the pigs which had been shipped by him, as set out in Overt Act No. 24.

All of which is contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the United States of America, do further find and present:

That, at Oklahoma City, Oklahoma, in the Western District of the State of Oklahoma, and within the jurisdiction of this Court, at Westville, Adair County; at McAlester, Pittsburg County; at Okmulgee, Okmulgee County, all in the State of Oklahoma; and at Chicago, Cook County, in the State of Illinois; and at divers other places to the Grand Jurors unknown and hence not herein stated, Ben Kapp, Bert Cox, Tom Woods alias T. C. Woods, Ralph McLarty alias Ralph McClardy, Lee Hopper, and L. L. Green alias Lindsey Green, whose more full, true, and correct names are to the Grand Jurors unknown, together with other persons to the Grand Jurors unknown, between September 1, 1933, and thence continuously thereafter until the return of this indictment, did unlawfully, wilfully, knowingly, corruptly, and feloniously conspire, combine, confederate, and agree together, to and with each other, and to and with divers other persons to the Grand Jurors unknown, in violation of Section 88, Title 18, U. S. C. A., to commit and do the acts and things made offenses and crimes against and in violation of the laws of the United States of America by Section 80 of Title 18, U. S. C. A., entitled:

"Presenting false claims; aiding in obtaining payment thereof.—Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the pay-

ment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition knowing the same to contain any fraudulent or fictitious statement or entry shall be fined not more than $10.000.00 or imprisonment not more than ten years, or both."

That the United States was at all times alleged in this indictment making plans to purchase and purchasing pigs from producers under the provisions of an Act of Congress approved May 12, 1933, known as Public Act No. 10 of the 73d Congress, entitled "An Act to
11 Relieve the Existing National Economic Emergency by Increasing Agricultural Purchasing Power, to Raise Revenue for Extraordinary Expenses Incurred by Reason of Such Emergency, to provide Emergency Relief with Respect to Agricultural Indebtedness, to Provide for the Orderly Liquidation of Joint Stock Land Banks, and for Other Purposes", and especially Chapter 26 of Title 7 thereof, in the United States Code, Annotated, and the regulations and rules made and promulgated by the Secretary of Agriculture of the United States to carry out the powers invested in him by said Act, and to make benefit payments under said Act, and that for the purpose of assuring that the benefit payments under said Act would reach the producers the Secretary of Agriculture promulgated on August 21, 1933, rules and regulations to the effect as follows:

"Hogs owned, consigned, or 'planted' by registered market yard traders or speculators are not eligible to benefit payments."

"Name and address of owner of hogs declared eligible to benefit payments must be furnished processor."

and on September 1, 1933, the said Secretary of Agriculture promulgated further rules and regulations to the effect as follows:

"Beginning Tuesday morning, September 5, no pigs will be purchased for the account of the Secretary of Agriculture unless permission has been granted authorizing the shipment.

"Permits must be secured from authorized processors through commission firms operating at authorized processing points or directly from authorized packers in cases where pigs will be shipped directly to authorized packers. However, pigs may be handled for individual farms by cooperative shipping associations or by country buyers, providing the farmer supplies with the pigs a letter or telegram constituting the permit authorizing the shipment. Cooperative shipped associations or country buyers also may act on behalf of the original owners in securing permits, but the permits must be granted in the name of the original owners.

"Permits obtained, beginning Tuesday, September 5, through commission firms or authorized packers are to be evidenced by letter or telegram to the original owner.

"Beginning immediately, no permits are to be issued by commission firms or by authorized packers to any one other than the original owner of the pigs. In no case are permits to be issued to any one owner for more than 200 head."

12 which said rules and regulations were in full force and effect during all the dates and times set forth in this indictment, as the defendants then and there well knew.

That is to say, it was the purpose and object of said conspiracy and of said conspirators, and each and all of them, that they, the said Ben Kapp, Bert Cox, Tom Woods alias T. C. Woods, Ralph McLarty alias Ralph McClardy, Lee Hopper, and L. L. Green alias Lindsey Green, should then and there falsely and fraudulently make certain false statements and misrepresentations, with intent to defraud the United States of America and the Secretary of Agriculture of the United States of America, whereby there would be shipped and transported to Rice Brothers, and the Quinn Commission Company, at Chicago, in Cook County, Illinois, for sale to the Secretary of Agriculture and the United States of America, in violation of said rules and regulations promulgated by the Secretary of Agriculture, certain pigs which the said defendants, Tom Woods, Ralph McLarty, Lee Hopper, and L. L. Green, had purchased and would purchase from farmers and producers of pigs in the State of Oklahoma and elsewhere, the exact places being to the Grand Jurors unknown, and said defendants would indicate and disclose, represent and state that the pigs so shipped would be the property of various producers other than the defendants, and which said pigs, when so shipped to the said Rice Brothers and the Quinn Commission Company at Chicago, Illinois, would be sold by them to the United States of America at the premium price to be paid for said pigs under the rules and regulations promulgated by the Secretary of Agriculture hereinabove set forth, and which said pigs would, in truth and in fact, be owned by and be the property of the said Tom Woods, Ralph McLarty, Lee Hopper, and L. L. Green, defendants herein;

That it was the purpose and object of said conspiracy and of said conspirators and each and all of them that they, the said Ben Kapp, Bert Cox, Tom Woods alias T. C. Woods, Ralph McLarty alias Ralph McClardy, Lee Hopper, and L. L. Green alias Lindsey Green, should then and there falsely and fraudulently make certain false statements and misrepresentations, with intent to defraud the United States of America and the Secretary of Agriculture of the United States of America; that they, the said defendants, would state and represent that producers, persons other than the defendants,

13 were the original owners and producers of the pigs that would be shipped and transported and sold to the Secretary of Agriculture of the United States of America when, in truth and in fact,

they, the said defendants and each of them, knew that the said pigs were the property of and were owned by the said defendants, Tom Woods, Ralph McLarty, L. L. Green, and Lee Hopper, and were not at that time the property of the original producer thereof, and said defendants and each of them, then and there, well knew that the said defendants, Tom Wood, Ralph McLarty, L. L. Green, and Lee Hopper, were not entitled to receive premium prices for said pigs so sold and owned by them, they the said Tom Woods, Ralph McLardy, L. L. Green, and Lee Hopper, under the rules and regulations above set forth, promulgated as aforesaid by the Secretary of Agriculture aforesaid;

That at all the times in this indictment mentioned, the said defendant, Ben Kapp, was and for a long time prior thereto had been a registered trader on the Oklahoma City Livestock Market under the trade name of "Kapp & Company" with offices in the Livestock Exchange Building, in Oklahoma City, Oklahoma, and also during that time was registered under the Packers and Stockyards Act as a trader; and that the said defendant, Bert Cox, was at all the times mentioned in this indictment and for a long time prior thereto had been a registered trader on the Oklahoma City Livestock Market as a commission firm and was registered under the Packers and Stockyards Act as a commission firm and market agency under the firm name of "Cox-Noel Commission Company" with offices in the Livestock Exchange Building, at Oklahoma City, Oklahoma; and that it was a part of the said conspiracy that Bert Cox and Ben Kapp would and by using their influence through commission firms on the Chicago, Illinois, Livestock Market, secure permits for the shipment of pigs to that market for sale to the Secretary of Agriculture at premium prices by the defendants Tom Woods, Ralph McLarty, L. L. Green, and Lee Hopper, knowing that these defendants, Tom Woods, Ralph McLarty, L. L. Green, and Lee Hopper, were not producers of pigs and that the pigs which they would ship on the permits to be secured by the said defendants, Bert Cox and Ben Kapp, were not the property of original producers;

That it was further the intent and purpose of the said defendants and each of them, and a part of said conspiracy, that the said
14 defendants, Tom Woods, Ralph McLarty, L. L. Green, and Lee Hopper, would furnish Rice Bros., and the Quinn Commission Company, of Chicago, Illinois, false information as to the actual ownership of the pigs to be contained in each shipment sent to those firms and to thereby cause representatives of those commission firms, acting as their agents in the sale of these pigs to the Secretary of Agriculture, to give false information and make false statements to representatives of the Secretary of Agriculture leading such representatives of the Secretary of Agriculture to believe that said pigs were being bought by said Secretary of Agriculture from the original producers thereof and that they were, therefore, eligible to the benefit payments provided for use the rules and regulations above set forth.

That it was further a part of said conspiracy that the said defendants would unlawfully, wilfully, knowingly, and feloniously present and cause to be presented to Wilson & Company, Armour & Company, and Guggenheim Bros., Inc., all of Chicago, Illinois, authorized processors of pigs and hogs under contract with the Secretary of Agriculture of the United States, invoices for pigs which would be shopped to Rice Bros., and the Quinn Commission Company, of Chicago, Illinois, by the defendants Tom Woods, Ralph McLarty, L. L. Green, and Lee Hopper, and sold by the said Rice Bros., and Quinn Commission Company to the said Wilson & Company, Armour & Company, and Guggenheim Bros., Inc., for the account of the Secretary of Agriculture at premium process as being the property of various alleged original producers and thereby cause the said Wilson & Company, Armour & Company, and Guggenheim Bros., Inc., to present and cause to be presented to Edward M. Tyler, Field Auditor of the Agricultural Adjustment Administration, who was authorized by the Secretary of Agriculture to approve for payment vouchers and claims upon or against the government of the United States of America and the Department of Agriculture covering the purchase of pigs during the Emergency Hog Marketing Program, vouchers and claims for large sums of money for approval and payment by the government of the United States of America, knowing said vouchers and claims were and would be false, fictitious, and fraudulent when so presented.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present that at the hereinafter said times, in pursuance of, in furtherance of, in execution of, and for the purpose of carrying out and to effect the object, design, and purpose of said conspiracy, the hereinafter named defendants, herein indicted, did unlawfully, wilfully, knowingly, and feloniously, at the several times and places hereinafter mentioned in connection with their names, the several acts hereinafter specified.

OVERT ACTS

1. That on or about the 6th day of September 1933, at Oklahoma City, Oklahoma, the defendant Ben Kapp wrote Mr. J. A. Quinn, of Quinn Commission Company, Union Stock Yards, Chicago, Illinois, requesting a permit for Ralph McLardy to ship three (3) double decks of government pigs.

2. That on or about the 7th day of September 1933, at Oklahoma City, Oklahoma, the defendant Ben Kapp wrote Mr. J. A. Quinn, of the Quinn Commission Company, Chicago, Illinois, advising him that three double decks of pigs would be shipped by Tom Woods from Westville, Oklahoma, on the permit which was issued for three double decks to arrive at Chicago on September 11, 1933.

3. That on or about the 5th day of September 1933, the defendant Bert Cox, at Oklahoma City, Oklahoma, arranged, through the defendant Ben Kapp, to secure a permit for the shipment of a double

deck of government pigs by Ralph McLarty from Okmulgee, Oklahoma, to Rice Bros., at Chicago, Ill.

4. That on or about the 8th day of September 1933, at Oklahoma City, Oklahoma, the defendant Bert Cox arranged, through the defendant Ben Kapp, to secure a permit for shipment of government pigs to the Quinn Commission Company, at Chicago, Illinois, by L. L. Green.

5. That on or about the 5th day of September 1933, at Oklahoma City, Oklahoma, the defendant Bert Cox arranged with the defendant Ben Kapp to secure a permit for the shipment of government pigs by Lee Hopper from McAlester, Oklahoma, to Rice Bros., of Chicago, Illinois.

16 6. That on or about September 11, 1933, the defendant Tom Woods caused Rosenbaum Bros., of Chicago, Illinois, agents for the Quinn Commission Company, to present and cause to be presented to Armour & Company, at Chicago, Illinois, an authorized processor of pigs and hogs under contract with the Secretary of Agriculture and the United States of America, invoices covering the following pigs:

271	pigs	@	$9.00	per	cwt.	for	a total of	$895.50
65	"		9.00	"	"	"	"	216.90
257	"		8.75	"	"	"	"	984.37
330	"		9.00	"	"	"	"	1,213.20

which pigs had been shipped by the said Tom Woods to the Quinn Commission Co., of Chicago, Illinois, as alleged in Overt Act No. 6 of the First Count herein, and which pigs had been sold by Rosenbaum Bros., as agents for the Quinn Commission Company, to Armour & Company for the Secretary of Agriculture as being the property of various producers, thereby causing the said Armour & Company to present and cause to be presented to E. M. Tyler, Field auditor of the Agricultural Adjustment Administration, authorized by the Secretary of Agriculture to approve for payment vouchers covering the purchase of pigs during the Emergency Hog Marketing Program, a voucher for approval and payment by the United States of America dated on or about September 11, 1933, containing among other items the items mentioned hereinabove, which voucher was designated by the said E. M. Tyler as C–3269.

7. That on or about September 12, 1933, the defendant Tom Woods caused Rosenbaum Bros., of Chicago, Illinois, agents for the Quinn Commission Company, to present and cause to be presented to Wilson & Company, at Chicago, Illinois, an authorized processor of pigs and hogs under contract with the Secretary of Agriculture and the United States of America, invoices covering the following pigs:

174	pigs	@t	$9.00	per	cwt.	for	a total of	$624.60
350	"	"	8.75	"	"	"	"	1,288.87

which pigs had been shipped by the said Tom Woods to the Quinn Commission Company of Chicago, Illinois, as alleged in Overt Act

No. 6 of the First Count herein, and which pigs had been sold by Rosenbaum Bros., as agents for the Quinn Commission Company to Wilson & Company for the Secretary of Agriculture as being the property of various producers, thereby causing the said Wilson & Company to present and cause to be presented to E. M. Tyler, Field Auditor of the Agricultural Adjustment Administration, authorized by the Secretary of Agriculture to approve for payment vouchers covering the purchase of pigs during the Emergency Hog Marketing Program, vouchers for approval and payment by the United States of America dated on or about September 12, 1933, containing, among other items, the items mentioned hereinabove, which vouchers were designated by the said E. M. Tyler as C–3116 and C–3455.

8. That on or about September 16, 1933, the defendant Ralph McLarty caused Rice Bros., of Chicago, Illinois, to present and cause to be presented to Armour & Company, at Chicago, Illinois, an authorized processor of pigs and hogs under contract with the Secretary of Agriculture and the United States of America, invoices covering the following pigs:

299 pigs @ $8.75 per cwt. for a total of $1,133.12

which pigs had been shipped by the said Ralph McLarty to Rice Bros., of Chicago, Illinois, as alleged in Overt Act No. 9, of the First Count herein, and which pigs had been sold by Rice Bros. to Armour & Company for the Secretary of Agriculture as being the property of various producers, thereby causing the said Armour & Company to present and cause to be presented to E. M. Tyler, Field Auditor of the Agricultural Adjustment Administration, authorized by the Secretary of Agriculture to approve for payment vouchers covering the purchase of pigs during the Emergency Hog Marketing Program, a voucher for approval and payment by the United States of America dated on or about September 16, 1933, containing, among other items, the item mentioned hereinabove, which voucher was designated by the said E. M. Tyler as C–4923.

9. That on or about September 16, 1933 the defendant Ralph McLarty caused Rice Bros., of Chicago, Illinois, to present and cause to be presented to Guggenheim Bros., Inc., at Chicago, Illinois, an authorized processor of pigs and hogs under contract with the Secretary of Agriculture and the United State' of America, invoices covering the following pigs:

92 pigs @ $8.75 per cwt. for a total of $340.37

which pigs had been shipped by the said Ralph McLarty to Rice Bros., of Chicago, Illinois, as alleged in Overt Act No. 9, of the First Count herein, and which pigs had been sold by Rice Bros. to Guggenheim Bros., Inc., at Chicago, for the Secretary of Agriculture as being the property of various producers, thereby causing the said Guggenheim Bros., Inc., to present and cause to be presented to E. M. Tyler, Field auditor of the Agricultural Adjustment Admin-

istration, authorized by the Secretary of Agriculture to approve for payment vouchers covering the purchase of pigs during the Emergency Hog Marketing Program, a voucher for approval and payment by the United States of America dated on or about September 16, 1933, containing, among other items, the item mentioned hereinabove, which voucher was designated by the said E. M. Tyler as C–4464.

10. That on or about September 16, 1933, the defendant L. L. Green caused Rosenbaum Bros., of Chicago, Illinois, agents for the Quinn Commission Company, to present and cause to be presented to Wilson & Company, at Chicago, Illinois, an authorized processor of pigs and hogs under contract with the Secretary of Agriculture and the United States of America, invoices covering the following pigs:

170 pigs @ $8.75 per cwt. for a total of $700.40
83 pigs @ 6.75 per cwt. for a total of 474.52

which pigs had been shipped by the said L. L. Green to the Quinn Commission Company, of Chicago, Illinois, as alleged in Overt Act No. 18 of the First Count herein, and which pigs had been sold by Rosenbaum Bros., as agents for the Quinn Commission Company to Wilson & Company for the Secretary of Agriculture as being the property of various producers, thereby causing the said Wilson & Company to present and cause to be presented to E. M. Tyler, Field Auditor of the Agricultural Adjustment Administration, authorized by the Secretary of Agriculture to approve for payment vouchers covering the purchase of pigs during the Emergency Hog Marketing Program, vouchers for approval and payment by the United States of America dated on or about September 16, 1933, containing, among other items, the items mentioned hereinabove, which vouchers were designated by the said E. M. Tyler as C–4302 and C–4303.

19 11. That on or about the 12th day of September, 1933, the defendant Lee Hopper caused Rice Bros., of Chicago, Illinois, to present and cause to be presented to Guggenheim Bros., Inc., at Chicago, Illinois, an authorized processor of pigs and hogs under contract with the Secretary of Agriculture and the United States of America, invoices covering the following pigs:

439 pigs @ $8.75 per cwt. for a total, $1,707.12
159 pigs @ 8.50 per cwt. for a total, 645.15

which pigs had been shipped by the said Lee Hopper to Rice Bros. of Chicago, Illinois, as alleged in Overt Act No. 24 of the First Count herein, and which pigs had been sold by Rice Bros. to Guggenheim Bros., Inc., for the Secretary of Agriculture as being the property of various producers, thereby causing the said Guggenheim Bros., Inc., to present and cause to be presented to E. M. Tyler, Field Auditor of the Agricultural Adjustment Administration, authorized by the Secretary of Agriculture to approve for payment vouchers covering the purchase of pigs during the Emergency Hog Marketing Program, a voucher for approval and payment by the United States of America dated on or about September 12, 1933, containing, among other items,

the items mentioned hereinabove, which voucher was designated by the said E. M. Tyler as C–3231.

All of which is contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

FRANCIS M. DUDLEY,
Assistant United States Attorney.

(Endorsed:) No. 11379. United States District Court, Western District of Oklahoma. The United States of America vs. Ben Kapp, Bert Cox, Tom Woods alias T. C. Woods, Ralph McLarty alias Ralph McClardy, Lee Hopper, and L. L. Green alias Lindsey Green. Indictment. Violation Section 88, Title 18, U. S. C. A. A true bill: George E. Calvert, Foreman. Returned and filed in open court this 29th day of Nov. A. D. 1935. Theodore M. Filson, Clerk. Bail $500.

20 In United States District Court

[Title omitted.]

Demurrer to Indictment

(Filed March 28, 1936)

Now comes Ralph McLarty and demurs to the first count of the indictment herein on the grounds and for the reason that the same wholly fails to state facts which constitute an offense against the laws of the United States.

Said defendant further demurs to the second count of the indictment herein on the grounds and for the reason that the same wholly fails to state facts which constitute an offense against the laws of the United States.

(Sgd.) STEELE & BOATMAN,
Attorney for Defendant Ralph McLarty.

[File endorsement omitted.]

21 In United States District Court

[Title omitted.]

Demurrer to Indictment

(Filed March 28, 1936)

Comes now the Defendants, Bert Cox, Lee Hopper, Tom Woods, and L. L. Green, and having read the indictment in the above cause demur to the first count of same, and for reasons show:

1. That said indictment and the matters therein contained, in the manner and form as same are stated and set forth therein, are not sufficient in law, and that the Defendants are not bound by the law of the land to answer the same, and this they are ready to verify.

2. That said indictment is duplicitous in that it charged more than one offense against the laws of the United States.

3. That said indictment is duplicitous in that it charges each of these Defendants with conspir'cy, when in truth and in fact the overt acts set out in said indictment show that there was no conspir'cy nor common action between the defendants Lee Hopper and L. L. Green, but show that the said Lee Hopper acted with the Defendant Ben Kapp, from McAlester, Oklahoma, and that L. L. Green acted with the Defendant Ben Kapp, from Lamar, Oklahoma, which were separate and distinct transactions, and said indictment does not state that Lee Hopper and L. L. Green acted together in any of the overt acts set out in said indictment.

22 4. The indictment charges that the Defendants conspired to defraud the government in violating an Act of Congress approved May 12, 1933, known as "Public Act No. 10" of the 73d Congress, and that said violation occurred in September 1933. That said act, and especially the sections of said act named in said indictment, to-wit, Sections 2 and 3 of said Act, has been declared null and void by the Supreme Court of the United States, and under said holdings of said Court the Acts set forth in said indictment do not constitute an offense against the laws of the United States.

5. That said indictment charges that the Defendants conspired to defraud the Government of the United States in that they conspired to sell hogs to the Secretary of Agriculture of the United States and caused to be issued permits to sell hogs to the said Secretary of Agriculture, and in securing said permits gave false information, and alleged that said Acts on the part of the Defendants were in violation of the Act of Congress approved May 12, 1933, known as "Public Act No. 10" of the 73d Congress, an act to relieve the national existing economic emergency by increasing agricultural purchasing power, and your Defendants say that said Act of Congress in no place gives the Secretary of Agriculture power and authority to buy hogs or pigs, and when the Secretary of Agriculture undertook to purchase pigs it was beyond the power vested in him by the Act of Congress, and said acts on the part of the Secretary of Agriculture were null and void and without effect.

6. Said indictment charges that the Secretary of Agriculture promulgated rules and regulations governing the buying of hogs or pigs by the government of the United States from the producers thereof, and Defendants say that said rules and regulations promulgated by said Secretary of Agriculture were null and void for the reason: That the Act of Congress did not authorize the Secretary of Agriculture to purchase hogs or pigs, but only authorized him to purchase cotton, and that the purchase of hogs was not included in said

23 act, and therefore the purchase of hogs was excluded. That said acts of the Secretary of Agriculture were null and void.

8. That said indictment charges that the Defendants were guilty of conspiracy for the reason that they violated certain rules and

regulations of the Secretary of Agriculture, and your Defendants say that said rules and regulations are not part of the statutes of the United States and that an indictment cannot be predicated upon the violation of a rule or regulation of said Secretary of Agriculture, and therefore the said indictment is null and void.

9. That said indictment charges that these Defendants violated rules of the Secretary of Agriculture, said rules being promulgated on September 31, 1933, with reference to farm products, and that said Act provided as follows: "However, pigs may be handled for individual farms by cooperative shipping associations or by country buyers", and said indictment did not negative the fact that the Defendants, Lee Hopper and L. L. Green, were country buyers within the meaning and intent of said rule. That said indictment is null and void.

10. That said indictment sets forth that the Defendants, Lee Hopper and Ben Kapp, entered into a conspiracy at McAlester, Oklahoma, to defraud the government, and that the city of McAlester, State of Oklahoma, is in the Eastern District of Oklahoma, and not in the Western District of Oklahoma, and that said allegation shows on its fact that this Court is without jurisdiction to try said charge.

11. That said indictment sets out further that the defendants, L. L. Green and Ben Kapp, entered into said consipracy at Lamar, Oklahoma, and that said Lamar, Oklahoma, is in the Eastern District of Oklahoma, and said indictment shows on its fact that this Court is without jurisdiction to try said cause.

24 DEMURRER TO SECOND COUNT OF INDICTMENT

Defendants demur to the second count of said indictment, and for reasons show:

1. That said indictment and the matters therein contained in the manner and form as same are stated and set forth therein, are not sufficient in law and that the defendants are not bound by the law of the land to answer the same, and this they are ready to verify.

2. That said indictment is duplicitous in that it charged more than one offense against the laws of the United States.

3. That said indictment is duplicitous in that it charges each of these Defendants with conspiracy, when in truth and in fact the overt acts set out in said indictment show that there was no conspiracy nor common action between the Defendants, Lee Hopper and L. L. Green, but show that the said Lee Hopper acted with the Defendant Ben Kapp, from McAlester, Oklahoma, and that L. L. Green acted with the defendant, Ben Kapp, from Lamar, Oklahoma, which were separate and distinct transactions, and said indictment does not state that Lee Hopper and L. L. Green acted together in any of said transactions.

4. The indictment charges that the Defendants conspired to defraud the Government in violating an Act of Congress approved May 12, 1933, known as "Public No. 10" of the 73d Congress, and that said

violation occurred in September 1933. That said act, and especially the sections of said act named in said indictment, to-wit, Sections 2 and 3, of said Act, has been declared null and void by the Supreme Court of the United States, and under said holdings of said Court the Acts set forth in said indictment do not constitute an offense against the laws of the United States.

5. That said indictment in said second count charges that Defendants conspired to defraud the Government of the United States in that they conspired to make false statements and misrepresentations with the intent to defraud the United States of America and the Secretary of Agriculture of the United States of America, whereby they would ship and transport pigs to various commission companies at Chicago, Illinois, in violation of the rules and regulations promulgated by the Secretary of Agriculture, and thereby defraud the Government, and the Supreme Court of the United States declared the Act mentioned in said second count null and void, and therefore the rules and regulations of said Secretary of Agriculture with reference to said shipment are void, and that said allegations in said indictment do not constitute an offense against the laws of the United States.

6. That said indictment alleges that the defendants made false statements with reference to ownership of hogs sold to the Secretary of Agriculture, and these Defendants say that the Secretary of Agriculture had no power or authority to buy hogs, and that the Act of Congress under which the Secretary of *the* Agriculture was buying hogs was null and void and the rules and regulations covering the same were null and void, and that the said indictment in said cause does not state an offense against the laws of the United States.

7. That said indictment states further that the acts complained of in said second count against said Lee Hopper occurred in McAlester, Oklahoma, and is without the jurisdiction of the Western District of the State of Oklahoma, and that this Court had no jurisdiction to try said Lee Hopper on the second count.

8. That said indictment states further that the acts complained of in said second count against said L. L. Green occurred in Lamar, Oklahoma, and is without the jurisdiction of the Western District of the State of Oklahoma, and that this Court had no jurisdiction to try the said L. L. Green on the second count.

9. That the sub-section of 4 of Paragraph 9 of said Act of Congress, with reference to processing of hogs, has been repealed.

Wherefore, for want of sufficient indictment in this behalf, said Defendants, and each of them, pray judgment of the Court that they be dismissed and discharged from said premises in said indictment specified.

WILKINSON & HUDSON,
Attorneys for Defendants.

WW:TM.

[File endorsement omitted.]

27 In United States District Court for the Western District of Oklahoma

No. 11,379–Cr.

UNITED STATES OF AMERICA, PLAINTIFF

v.

BEN KAPP, ET AL., DEFENDANTS

Opinion on demurrers to indictment

Filed April 6, 1937

An indictment in this case was returned at the January 1935 Term of District Court on November 29, 1935, charging the defendants in the first count with a conspiracy to violate Sections 2 and 8 of an act known as Public Act No. 10 of the 73rd Congress, entitled "An Act to Relieve the Existing National Economic Emergency by Increasing Agricultural Purchasing Power, to Raise Revenue for Extraordinary Expenses Incurred by Reason of such Emergency, to Provide Emergency Relief with Respect to Agricultural Indebtedness, to Provide for the Orderly Liquidation of Joint Stock Land Banks, and for other purposes."

This act, which the defendants are charged with having violated, or having conspired to violate, was held unconstitutional and void by the Supreme Court of the United States on the 6th day of January 1936.

28 If this act was void, then no offense is charged in the first count of the indictment because the defendants could not be charged even under Section 88, Title 18, U. S. C. A., the conspiracy statute, with conspiring to violate a law which was not in existence for, under the decision of the Supreme Court, the law was void ab initio.

The second count alleges the same state of facts and charges the defendants with conspiring to violate Section 80, Title 18, U. S. C. A., entitled "Presenting False Claims; Aiding in Obtaining Payment Thereof", which is as follows:

"Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the

United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit", et cetera.

The overt acts charged, which would be material in this count, are that hogs were shipped under the representation by the defendants that they were the hogs of various producers when in fact the hogs belonged to one or more of the defendants.

There is no contention that the hogs were not shipped and that the bills, which were made to Armour and Company and other processors, were not correct bills, with the exception that the hogs did not originate from the sources represented by the defendants.

This ceases to be a material fact, if the provisions of the Agri-
29 cultural Adjustment Act are void. In other words, the representations, which are alleged to have been made, cease to be misrepresentations of material facts when the act itself falls.

The demurrer to the indictment, as to each count, is sustained. An exception is allowed.

EDGAR S. VAUGHT,
United States District Judge.

Dated this 6th day of April 1937.
[File endorsement omitted.]

30 In United States District Court for the Western District of Oklahoma

No. 11379 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

BEN KAPP, BERT COX, TOM WOODS ALIAS T. G. WOODS, RALPH MCLARTY ALIAS RALPH MCCLARDY, LEE HOPPER, AND L. L. GREEN ALIAS LINDSEY GREEN, DEFENDANTS

Order Sustaining Joint and Separate Demurrers of Defendants Bert Cox, Tom Woods, Ralph McLarty, Lee Hopper, and L. L. Green and Order Dismissing Case as to All Defendants

Filed April 6, 1937

Now, on this 6th day of April 1937, this case comes on for further and final hearing upon the joint and separate demurrers of the defendants Ben Kapp, Bert Cox, Tom Woods, Ralph McLarty, Lee Hopper, and L. L. Green, to the indictment, and the Court, upon consideration thereof, finds that the same should be sustained.

The Court further finds that the defendant Ben Kapp has not filed a demurrer to the indictment herein, but that the Court should con-

sider at this time that a demurrer was filed on behalf of the defendant Kapp, and that the same as to said defendant should be sustained.

It is, therefore, considered, ordered, adjudged, and decreed by the Court that the joint and separate demurrers of the defendants heretofore filed herein be and the same are hereby sustained.

It is further ordered that said cause be and the same is hereby dismissed as to each of said defendants and said defendants are hereby discharged and their bonds exonerated; to which action of the Court the plaintiff excepts and its exception is by the Court allowed.

EDGAR S. VAUGHT,
Judge.

[File endorsement omitted.]

31 In United States District Court

[Title omitted.]

Petition for Appeal

Filed May 4, 1937

Comes now the United States of America, plaintiff herein, and states that on the 6th day of April 1937, demurrers of the defendants Ben Kapp, Bert Cox, Lee Hopper, Tom Woods, L. L. Green, and Ralph McLarty to each and every count of the indictment herein were by the court sustained, and the plaintiff feeling aggrieved at the ruling of said District Court in sustaining said demurrers, as to the second count, prays that it be allowed an appeal to the Supreme Court of the United States for a reversal of said judgment and order insofar as it sustains the demurrers of the defendants to the second count of the indictment and that a Transcript of the record in this cause duly authenticated may be sent to said Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause.

UNITED STATES OF AMERICA.
William C. Lewis,
WILLIAM C. LEWIS
United States Attorney, Western District of Oklahoma.

[File endorsement omitted.]

38 In United States District Court

[Title omitted.]

Assignments of Error

Filed May 5, 1937

Comes now the United States of America, by William C. Lewis, United States Attorney for the Western District of Oklahoma, and avers that in the record proceedings and judgment herein there is

manifest error and against the just rights of the said plaintiff in this, to-wit:

1. That the Court committed material error against plaintiff in sustaining the demurrers of the defendants Ben Kapp, Bert Cox, Tom Woods, Ralph McLarty, Lee Hopper, and L. L. Green, and each of them to the second count of the indictment.

2. That the Court committed material error against plaintiff in sustaining said demurrers, in holding that the second count of the indictment stated no offense on the ground and for the reason that the misrepresentations of fact alleged were not representations of a material fact within the meaning of Section 35, Criminal Code, inasmuch as the pertinent provisions of the Agricultural Adjustment Act of May 12, 1933, Chapter 25, Title I (U. S. C., Title 7, Sections 602, 608), are void.

3. That the Court committed material error against the plaintiff in sustaining the said demurrers, in holding that Section 35 of the Criminal Code (U. S. C., Title 18, Section 80) and Section 37
39 of the Criminal Code (U. S. C., Title 18, Section 88) did not extend to and punish the offenses and acts of the defendants alleged in Count 2 of the indictment herein.

WILLIAM C. LEWIS,
United States Attorney, Western District of Oklahoma.

[File endorsement omitted.]

40 In United States District Court

[Title omitted.]

Order Allowing Appeal to the Supreme Court of the United States

Filed May 5, 1937

This cause having come on this day before the Court on the Petition of the United States of America, plaintiff herein, praying an appeal to the Supreme Court of the United States for a reversal of the judgment herein sustaining a demurrer of the defendants Ben Kapp, Bert Cox, Lee Hopper, Tom Woods, Ralph McLarty, and L. L. Green to each and every count of the indictment in said cause, and that a duly certified copy of the Record in said cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered said motion, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of this Court, it is, therefore, by the Court, Ordered and Adjudged that the plaintiff herein, the United States of America, be, and it is hereby, allowed an appeal from the order and judgment of this Court in sustaining the demurrers of the defendants to the indictment, to the Supreme Court of the United States, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court.

41 It is further Ordered that the United States of America be, and it is hereby, permitted a period of forty days from the date hereof in which to file and docket said appeal in the Supreme Court of the United States.

Dated at Enid, Oklahoma, this 5th day of May 1937.

By the Court:

EDGAR S. VAUGHT,
Judge.

[File endorsement omitted.]

43 Citation in usual form showing service on Wilkinson & Hudson et al., filed May 12, 1937, omitted in printing.

46 In United States District Court

[Title omitted.]

Praecipe for Transcript of Record

Filed May 12, 1937

To the Clerk, United States District Court, Western District of Oklahoma:

The appellant hereby directs that in preparing transcript of the record of this cause in the United States District Court for the Western District of Oklahoma in connection with its appeal to the Supreme Court of the United States you include the following:

1. Indictment.
2. Demurrers.
3. Opinion.
4. Judgment sustaining demurrers.
5. Petition for Appeal to the Supreme Court.
6. Statement of Jurisdiction of Supreme Court.
7. Assignments of errors.
8. Order Allowing Appeal.
9. Notice of service on appellee of Petition for Appeal, Order Allowing Appeal, Assignment of Errors, and Statement as to Jurisdiction.
10. Citation.
11. Praecipe.

William C. Lewis
WILLIAM C. LEWIS,
United States Attorney, Western District of Oklahoma.

47 Service of the foregoing Praecipe for Transcript of Record is acknowledged this 8 day of May 1937.

WILKINSON & HUDSON,
STEELE & BOATMAN,
O. A. CARGILL,
Attorneys for Defendants.

[File endorsement omitted.]

48 In United States District Court

[Title omitted.]

Election as to Printing

Filed May 26, 1937

The plaintiff hereby elects to have transcript of record on appeal to the United States Supreme Court in the above cause printed under the supervision of the clerk of said Supreme Court.

May 26th, 1937.

WILLIAM C. LEWIS,
United States Attorney.

[File endorsement omitted.]

49 Clerk's Certificate to foregoing transcript omitted in printing.

51 In Supreme Court of the United States

Statement of Points Relied Upon, and Designation of Entire Record for Printing

Filed June 2, 1937

Pursuant to Rule XIII, Paragraph 9, of this Court, appellant states that it intends to rely upon all of the points in its assignment of errors.

Appellant deems the entire record, as filed in the above entitled cause, necessary for the consideration of the points relied upon.

Stanley Reed,
STANLEY REED,
Solicitor General.

Service acknowledged June —, 1937.

[File endorsement omitted.]

(Endorsement on cover:) File No. 41578. W. Oklahoma, D. C. U. S. Term No. 97. The United States of America, appellant, *vs.* Ben Kapp, Bert Cox, Tom Woods, etc., et al. Filed May 29, 1937. Term No. 97 O. T. 1937.

In the District Court of the United States for the Western District of Oklahoma

No. 11379 Cr.

UNITED STATES OF AMERICA, PLAINTIFF

v.

BEN KAPP, BERT COX, TOM WOODS, ALIAS T. C. WOODS, RALPH MCLARTY, ALIAS RALPH MCCLARDY, LEE HOPPER, and L. L. GREEN, ALIAS LINDSEY GREEN, DEFENDANTS

STATEMENT OF JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is confererd by Title 18, Section 682, of the United States Code, otherwise known as the Criminal Appeals Act, and by Section 345, Title 28, of the United States Code.

B. The statutes of the United States, the construction of which is involved herein, are Sections 35 and 37 of the Criminal Code (U. S. C., Title 18,

Sections 80 and 88). Section 35 of the Criminal Code is as follows:[1]

> Presenting false claims; aiding in obtaining payment thereof. Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of

[1] This section, as amended by the Act of June 18, 1934, c. 587, 48 Stat. 996, is as follows: "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Section 37 of the Criminal Code is as follows:

Conspiring to commit offense against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

C. The judgment of the District Court sought to be reviewed was entered on April 6, 1937, and an

application for appeal was filed on May 4th, 1937, and is presented to the District Court herewith, to-wit: on this the 5th day of May 1937.

The indictment in this case is in two separate counts, each of which is based upon Section 37 of the Criminal Code. The first count is not here involved, as no error is assigned to the order sustaining demurrers to that count. The second count alleges a conspiracy by the defendants to violate Section 35 of the Criminal Code, as amended, by making and presenting false claims and representations whereby the defendants would obtain from the United States monies in payment of benefits to which they were not entitled. Demurrers to the indictment were filed by the defendants Ben Kapp, Bert Cox, Tom Woods, Ralph McLarty, Lee Hopper, and L. L. Green, and were sustained by the District Court. In its opinion the Court held that the demurrers must be sustained as to the second count, which charges a conspiracy to violate Section 35 of the Criminal Code, as amended, because that section does not penalize false claims and representations made to secure benefits under a statute (the Agricultural Adjustment Act) which is unconstitutional. The Court held that in these circumstances the falsity of the representations did not relate to a material fact within the meaning of Section 35 of the Criminal Code.

The question decided by the District Court is a substantial and important one, and the decision ap-

pears to be in conflict with the decisions in *Madden* v. *United States*, 80 F. (2d) 672 (C. C. A. 1st), certiorari denied, 297 U. S. 710; *United States* v. *Harding*, 81 F. (2d) 563 (App. D. C.); and *Langer* v. *United States*, 76 F. (2d) 817, 824–825 (C. C. A. 8th).

The following decisions are believed to sustain the jurisdiction of the Supreme Court:

United States v. *Heinze*, 218 U. S. 532.
United States v. *Hastings*, 296 U. S. 188.
United States v. *Bitty*, 208 U. S. 393, 399.
United States v. *Keitel*, 211 U. S. 370.

Appended hereto is a copy of the opinion of the Court filed April 6, 1937.

Respectfully submitted.

STANLEY REED,
Solicitor General.
William C. Lewis,
WILLIAM C. LEWIS,
United States Attorney.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 11379 Cr.

UNITED STATES OF AMERICA, PLAINTIFF

vs.

BEN KAPP ET AL., DEFENDANTS

OPINION ON DEMURRER TO INDICTMENT

An indictment in this case was returned at the January 1935 Term of District Court on November 29, 1935, charging the defendants in the first count with a conspiracy to violate Sections 2 and 8 of an act known as Public Act No. 10, of the 73rd Congress, entitled "An Act to Relieve the Existing National Economic Emergency by Increasing Agricultural Purchasing Power, to Raise Revenue for Extraordinary Expenses Incurred by Reason of Such Emergency, To Provide Emergency Relief with Respect to Agricultural Indebtedness, to Provide for the Orderly Liquidation of Joint Stock Land Banks and for other purposes."

This act, which the defendants are charged with having violated, or having conspired to violate, was held unconstitutional and void by the Supreme Court of the United States on the 6th day of January, 1936.

If this act was void then no offense is charged in the first count of the indictment because the defendants could not be charged even under Section 88, Title 18, U. S. C. A., the conspiracy statute, with conspiring to violate a law which was not in existence for, under the decision of the Supreme Court, the law was void ab initio.

The Second Count alleges the same state of facts and charges the defendants with conspiring to violate Section 80, Title 18, U. S. C. A., entitled "Presenting False Claims; Aiding in Obtaining Payment Thereof", which is as follows:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stock-

holder, shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, toll, account, claim, certificate, affidavit, et cetera.

The overt acts charged, which would be material in this court, are that hogs were shipped under the representation by the defendants that they were the hogs of various producers when in fact the hogs belonged to one or more of the defendants.

There is no contention that the hogs were not shipped and that the bills, which were made to Armour and Company and other processors, were not correct bills, with the exception that the hogs did not originate from the sources represented by the defendants.

This ceases to be a material fact, if the provisions of the Agricultural Adjustment Act are void. In other words, the representations, which are alleged to have been made, cease to be misrepresentations of material facts when the act itself falls.

The demurrer to the indictment, as to each count, is sustained. An exception is allowed.

EDGAR S. VAUGHT,
United States District Judge.

(Endorsed:) Filed May 4, 1937. Theodore M. Filson, Clerk. By Margaret P. Blair, Deputy.

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Specification of errors to be urged	7
Summary of Argument	7
Argument:	
I. Notwithstanding the unconstitutionality of the Agricultural Adjustment Act, appellees may be guilty of conspiracy to violate Section 35 of the Criminal Code, by fraudulently obtaining benefit payments under that Act	9
II. Appellees are estopped to attack the constitutionality of the Agricultural Adjustment Act	25
Connclusion	30
Appendix	31

CITATIONS

Cases:	
American Bond & Mortgage Co. v. *United States*, 52 F. (2d) 318	29
Anniston Mfg. Co. v. *Davis*, 301 U. S. 337	11
Ayers v. *Newark*, 49 N. J. L. 170	30
Booth Fisheries v. *Industrial Comm.*, 271 U. S. 208	26
Buck v. *Kuykendall*, 267 U. S. 307	27
Burton v. *United States*, 196 U. S. 283	11
Cagle v. *United States*, 3 F. (2d) 746	17
Capone v. *United States*, 51 F. (2d) 609	11
City of Topeka v. *Dwyer*, 70 Kan. 244	18
Columbus & Greenville Ry. v. *Miller*, 283 U. S. 96	12
Curtin v. *Barton*, 139 N. Y. 505	18
Daniels v. *Tearney*, 102 U. S. 415	25, 29
Great Falls Mfg. Co. v. *Attorney General*, 124 U. S. 581	26, 28, 29
Hall v. *Johnson*, 41 Mich. 286	24
Harding v. *United States*, 81 F. (2d) 563	16, 17
Hirsh v. *Block*, 267 Fed. 614, 256 U. S. 135	29
Humbird v. *Avery*, 195 U. S. 480	29
Hunt v. *State*, 186 Ind. 644	30
Hurley v. *Commission of Fisheries*, 257 U. S. 223	26
Ingles v. *People*, 90 Colo. 51	29
Jannett v. *Windham*, 109 Fla. 129	29
Kirby v. *State*, 57 N. J. L. 320	19
Kluczek v. *State*, 115 N. J. L. 105	29

Cases—Continued. Page

Langer v. *United States*, 76 F. (2d) 817 ..... 16, 17
Madden v. *United States*, 80 F. (2d) 672 14
Norton v. *Shelby County*, 118 U. S. 425 21
Pierce Oil Co. v. *Phoenix Refining Co.*, 259 U. S. 125 28
St. Louis Co. v. *Prendergast Co.*, 260 U. S. 469 25
Smith v. *Indiana*, 191 U. S. 138 ..... 12, 13
Smith v. *Lynch*, 29 Oh. St. 261 18
Smith v. *Sheeley*, 12 Wall. 358 18
State v. *Board of Police Commissioners*, 56 N. J. L. 258 30
State v. *Collins*, 225 Mo. 633 30
State v. *Gardner*, 54 Oh. St. 24 19
State v. *Stone*, 46 La. Ann. 147 30
Strang, Ex parte, 21 Oh. St. 610 18
United Gas Co. v. *Railroad Comm.*, 278 U. S. 300 ..... 26, 27, 28
United States v. *Bowman*, 260 U. S. 94 11
United States v. *Butler*, 297 U. S. 1 ..... 11, 29
United States v. *Cohn*, 270 U. S. 339 11
United States v. *Harding*, 81 F. (2d) 563 16
United States v. *MacDonald*, 10 F. Supp. 948 ..... 11, 14
United States v. *Realty Co.*, 163 U. S. 427 22
United States v. *Schor*, 13 F. Supp. 399 17
United States v. *Seelig and Mesch Construction and Equipment Corp.* (S. D. N. Y., Dec. 8, 1936) 15
United States v. *Soeder*, 10 F. Supp. 944 ..... 11, 17
Wall v. *Parrot Silver & Copper Co.*, 244 U. S. 407 ..... 26, 28

Statutes:

Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31 ..... 3, 4
Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682) 1
Criminal Code:
Sec. 28 (U. S. C., Title 18, Sec. 72) 14
Sec. 35, 35 Stat. 1095, as amended by the Act of October 23, 1918, ch. 194, 40 Stat. 1015 (U. S. C., Title 18, Sec. 80) 2
Sec. 37 (U. S. C., Title 18, Sec. 88) 2

Miscellaneous:

Bigelow, Fraud (1888) p. 497 24
Bower, Spencer, Actionable Misrepresentation (1911) Sec. 128 25
Field, The Effect of an Unconstitutional Statute 18, 19
Opinions of the Attorney General:
Vol. 10, p. 56 12
Vol. 31, pp. 213, 475 12
Vol. 35, p. 110 12
Vol. 36, p. 21 12
Vol. 38, p. — 12
Vol. 39, p. — 12

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 97

THE UNITED STATES OF AMERICA, APPELLANT

v.

BEN KAPP, BERT COX, TOM WOODS, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court appears at R. 19–20.

JURISDICTION

The judgment of the District Court was entered April 6, 1937 (R. 20). The appeal to this Court was prayed for and allowed on May 5, 1937 (R. 21, 22). Probable jurisdiction was noted on October 11, 1937. The jurisdiction of this Court to review, on direct appeal, is conferred by the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Section 682).

QUESTION PRESENTED

Whether the District Court erred in sustaining the demurrer of the appellees to the second count of the indictment which charged them with conspiring to falsify material facts, in securing benefits under the provisions of the Agricultural Adjustment Act, for the purpose of defrauding the United States.

STATUTES INVOLVED

Section 37 of the Criminal Code, 35 Stat. 1096 (U. S. C., Title 18, Section 88) follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

Section 35 of the Criminal Code, 35 Stat. 1095, as amended by the Act of October 23, 1918, c. 194, 40 Stat. 1015, provides:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government

of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both. * * *

STATEMENT

On November 29, 1935, the appellees were indicted on two counts in the United States District Court for the Western District of Oklahoma (R. 1–15). The first count, as interpreted by the District Court in its opinion (R. 19), charged a conspiracy to violate the provisions of the Agricultural Adjustment Act. The first count is not here in-

volved, as no error is assigned to the order sustaining the demurrer as to it.

The second count, which is here in issue, alleges a conspiracy to violate Section 35 of the Criminal Code as amended, by making false claims, statements and representations, with intent to defraud the United States, whereby the defendants would obtain from the United States moneys in payment of benefits, allowed under the provisions of the Agricultural Adjustment Act, to which they were not entitled.

The second count first describes the hog-buying program of the Government. It is averred (R. 8) that the United States was at all times alleged in the indictment engaged in purchasing pigs from producers under the provisions of the Agricultural Adjustment Act of May 12, 1933, and under the rules and regulations made and promulgated by the Secretary of Agriculture to carry out the powers invested in him by that Act; and that, for the purpose of assuring that benefit payments provided for in the Act would reach the producers, the Secretary of Agriculture promulgated rules and regulations to the effect that hogs owned or consigned by traders and speculators were not eligible to benefit payments, and that the name and address of the owners of hogs declared eligible to benefit payments must be furnished to the processors receiving the hogs at the market. Further regulations are set out in the indictment, which

provided that pigs could be handled for individual farms by country buyers providing the farmer supplied with the pigs a letter or telegram authorizing the shipment.

These allegations are then made (R. 9):

> * * * it was the purpose and object of said conspiracy * * * that they [the defendants] should then and there falsely and fraudulently make certain false statements and misrepresentations, with intent to defraud the United States * * * whereby there would be shipped and transported to [a Chicago Commission Company] for sale to the Secretary of Agriculture and the United States of America * * * certain pigs which the defendants * * * had purchased and would purchase from farmers and producers of pigs * * * and said defendants would indicate and disclose, represent and state that the pigs so shipped would be the property of various producers other than the defendants, and which said pigs * * * would be sold by [the Commission Companies] to the United States of America at the premium price to be paid for said pigs under the rules and regulations promulgated by the Secretary of Agriculture hereinabove set forth, and which said pigs would, in truth and fact, be owned by * * * [the defendants].

The indictment alleges that it was part of the conspiracy directed toward a sale of the pigs to the Secretary of Agriculture that certain defendants

influential with Chicago commission firms would secure permits for the shipment of the pigs; that other defendants, pretending to be the original producers, would cause the Chicago commission merchants, acting as their agents in the sale, to lead representatives of the Secretary of Agriculture to believe that they were buying from the original producers (R. 10); and would cause to be presented to certain processing firms invoices for the pigs, as being the property of the original producers and sold by the commission merchants for the account of the Secretary of Agriculture; and would thereby cause the processors to present fictitious claims to the Field Auditor of the Agricultural Adjustment Administration (who was authorized by the Secretary of Agriculture to approve for payment such claims and vouchers), "knowing said vouchers and claims were and would be false, fictitious, and fraudulent" (R. 11).

The indictment further alleges eleven overt acts in pursuance of the conspiracy, setting out in detail that during September 1933 permits for shipment of the Government pigs were secured, and the defendants caused the agents of the commission merchants to present to processing firms invoices covering the pigs shipped, thereby causing the processors to present specified vouchers, containing items covering these invoices, to the Field Auditor of Agricultural Adjustment Administration (R. 11–15).

A demurrer, raising various objections, was interposed by defendants (R. 15, 17–18). On April 6, 1937, the demurrer was sustained as to each count, the court assigning as its reason the invalidity of the Agricultural Adjustment Act. As to the second count, it concluded that the misrepresentations as to who owned the hogs shipped "cease to be misrepresentations of material facts when the act itself falls". (R. 19–20.)

SPECIFICATION OF ERRORS TO BE URGED

1. The District Court erred in holding that the second count of the indictment stated no offense on the ground that the misrepresentations of facts alleged were not misrepresentations of facts within the meaning of Section 35 of the Criminal Code as amended, in as much as the Agricultural Adjustment Act is void.

2. The District Court erred in holding that Section 35 of the Criminal Code does not extend to and punish the offenses and acts of the defendants alleged in Count two of the indictment herein.

3. The District Court erred in sustaining the demurrer to the second count of the indictment.

SUMMARY OF ARGUMENT

I

Notwithstanding the unconstitutionality of the Agricultural Adjustment Act, appellees may be guilty of conspiracy to violate Section 35 of the

Criminal Code by obtaining benefit payments under that Act. Section 35 punishes anyone who shall wilfully falsify or conceal a material fact or make any false or fraudulent representations for the purpose and with the intent of cheating the United States. It was intended to protect the Government against all frauds, including frauds directed to activities of the Government undertaken pursuant to an unconstitutional statute. Because money should not be paid out of the Treasury to some favored class it does not follow that others may with impunity falsely represent that they are of that class, and so enrich themselves at public expense. Appellees conspired to cheat the Government by selling hogs at premium prices through misrepresentation as to the identity of the hogs sold. Although the Agricultural Adjustment Act is void, this Court will consider, as included in the facts of this case, the fact that this statute was passed, and that the Secretary of Agriculture promulgated regulations providing for purchase of hogs at premium prices only from the original producers. In view of these facts the representation made by appellees, that they were the producers of certain hogs to be sold to the Secretary of Agriculture, was clearly "material" within the meaning of Section 35 of the Criminal Code.

II

In any event appellees are estopped to attack the constitutionality of the Agricultural Adjust-

ment Act. They caused vouchers to be presented for payment to the agent appointed by the Secretary of Agriculture. Having invoked the Act, by action designed to secure benefits under the Act, they are estopped to assail its validity.

ARGUMENT

I

NOTWITHSTANDING THE UNCONSTITUTIONALITY OF THE AGRICULTURAL ADJUSTMENT ACT, APPELLEES MAY BE GUILTY OF CONSPIRACY TO VIOLATE SECTION 35 OF THE CRIMINAL CODE, BY FRAUDULENTLY OBTAINING BENEFIT PAYMENTS UNDER THAT ACT

The second count of the indictment charges a conspiracy (Section 37, Criminal Code, *supra*, p. 2) to violate Section 35 of the Criminal Code, *supra*, pp. 2–3. The latter section punishes one who "shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations" "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States."

In this case the appellees conspired to cheat the United States by selling hogs to the Government at premium prices through misrepresentation as to the identity of the producers of the hogs sold. In

sustaining the demurrer interposed by appellees, the District Judge reasoned as follows (R. 20):

> The overt acts charged, which would be material in this count, are that hogs were shipped under the representation by the defendants that they were the hogs of various producers when in fact the hogs belonged to one or more of the defendants.
>
> There is no contention that the hogs were not shipped and that the bills, which were made to Armour and Company and other processors, were not correct bills, with the exception that the hogs did not originate from the sources represented by the defendants.
>
> This ceases to be a material fact, if the provisions of the Agricultural Adjustment Act are void. In other words, the representations, which are alleged to have been made, cease to be misrepresentations of material facts when the act itself falls.

1. The court's opinion disregards the legal significance of the fact that appellees were indicted on the second count, not for a conspiracy to violate the Agricultural Adjustment Act, but rather for a conspiracy to violate Section 35 of the Criminal Code, protecting the United States Government against frauds. The broad reach intended for Section 35 is apparent from a consideration of the amendment by the Act of October 23, 1918, c. 194, 40 Stat. 1015. The statute, originally confined to the punishment of those presenting fraudulent claims based upon

the Government's own liability, *United States* v. *Cohn*, 270 U. S. 339, 345–346, was extended to "include others * * * who cause pecuniary or property loss to the government by willfully concealing by some trick, etc., a material fact." *Capone* v. *United States*, 51 F. (2d) 609, 615 (C. C. A. 7th). In view of the ruling of *United States* v. *Bowman*, 260 U. S. 94, 102, that Section 35 must not be given an artificially strict construction but must be "fairly construed according to the legislative intent," it is clear that the section was intended to cover *all* situations in which the Government might be cheated.

In reaching a result contrary to other rulings announced on an identical fact situation, *United States* v. *MacDonald*, 10 F. Supp. 948 (W. D. Mo.); *United States* v. *Soeder*, 10 F. Supp. 944 (W. D. Mo.), the court below apparently proceeded on the assumption that the Government could not be defrauded when operating under an invalid law.[1]

[1] The assigned errors, through a parenthetical citation, imply that the hog purchases were undertaken under Section 8 of the Agricultural Adjustment Act, c. 25, 48 Stat. 31 (R. 22). This section was declared invalid in *United States* v. *Butler*, 297 U. S. 1. We are informed that in fact the purchases were with funds made available for activities under Section 12 (b) of the original Act, the validity of which was not considered in the *Butler* case. In conformity to the settled policy of this Court not unnecessarily to decide constitutional questions, *Burton* v. *United States*, 196 U. S. 283, 295; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 355, we assume for the purpose of this argument that Section 12 (b) was inseparably linked to Section 8, and that the payments were accordingly made under an unconstitutional statute.

But the money which the respondents sought to obtain was money of the United States. Whether or not the statute and regulations under which the respondents made claim for payment were constitutional, their misrepresentations were made "with the intent of cheating * * * the Government." As such they are condemned by Section 35, irrespective of the constitutionality of the Act under which payments were made.

2. The court below apparently proceeded upon the hypothesis that the Government officials should have known that the statute was unconstitutional and that respondents' misrepresentations thus could not be taken to be material since payment should not be made in any event. Such a hypothesis is unrealistic. It ignores a vital principle of practical constitutional government, that a law is presumed to be constitutional until it is judicially declared invalid, and that it is the duty of Government officials to enforce a statute duly enacted by Congress until it is held to be invalid.[2]

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[2] 31 Op. A. G. 475, 476 (Attorney General Palmer); 35 Op. A. G. 110, 114–115 (Attorney General Stone, referring to a letter written by a predecessor); 38 Op. A. G. —— (Opinion of August 16, 1935; Attorney General Cummings); 39 Op. A. G. —— (Opinion of March 26, 1937; Attorney General Cummings); see also 36 Op. A. G. 21, 25 (Attorney General Mitchell; cf. 10 Op. A. G. 56, 61 (Attorney General Bates); 31 Op. A. G. 213, 215 (Acting Attorney General Davis). It is settled doctrine in this Court that a public official has no standing, under the due process clause, to attack the constitutionality of a statute which he is under a duty to enforce. See e. g. *Smith* v. *Indiana*, 191 U. S. 138, 148; *Colum-*

Certainly the respondents knew that the Government officials were acting on the assumption that the statute was constitutional, else they would not have presented the false claims. And since the Government officials were in fact making the payments, the misrepresentations were necessarily material and served to defraud the Government, whatever the ultimate decision as to the constitutional authority to make the payments.

Any other doctrine would have most dangerous consequences in the encouragement of fraud and chicanery in dealing with the Government. Further; the logic would seem to carry over to outright theft of Government property used in a program later declared unconstitutional, since the United States might be said to be without authority to purchase or hold the property for such a purpose, and thus to reduce the central government to a status at least reminiscent of that of the felon declared outlaw at ancient common law.

3. The uniform course of decisions in other courts makes it plain that there is nothing in the logic of constitutional government which requires that payments made pursuant to an unconstitu-

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Bus & Greenville Ry. v. *Miller*, 283 U. S. 96, 99. In *Smith* v. *Indiana*, *supra*, 148, the Court said in *dictum:*

"* * * there are many authorities to the effect that a ministerial officer, charged by law with the duty of enforcing a certain statute, cannot refuse to perform his plain duty thereunder upon the ground that in his opinion it is repugnant to the Constitution."

tional program be declared fair game for knaves and cheats.

Trenchant reference to the realities of the situation may be found in *United States* v. *MacDonald, supra* (10 F. Supp. 948):

> Let it be assumed arguendo that in the Agricultural Adjustment Act there was an unconstitutional delegation of legislative power. Let it be assumed arguendo that the regulations made by the Secretary of Agriculture and referred to in the indictment were not authorized. Still the government did devise a pig buying program. Certainly any who conspired together to sell pigs to the government under that program, falsely representing that they were entitled to the benefit of its provisions and so to obtain money from the public treasury, have committed a crime. *Because money should not be paid out of the treasury to some favored class it does not follow that others who falsely represent that they are of that class, and so enrich themselves at public expense, should go unpunished.* [Italics added.]

Contrary to the approach of and the result reached by the court below is the case of *Madden* v. *United States,* 80 F. (2d) 672 (C. C. A. 1st). An indictment drawn under Section 28 of the Criminal Code, U. S. C., Title 18, Sec. 72, which prohibits forgeries made "for the purpose of defrauding the United States", charged the forgery of a name to an assignments and identification card

used by the Civil Works Administration in the selection of individuals employed on a project to which Federal funds were advanced. The defense was interposed that the National Industrial Recovery Act, under which the money was appropriated, was unconstitutional. The court said (p. 674):

> There seems to be some diversity of opinion as to the constitutionality of this law * * *; but this is not a question which we must decide, for if we were to assume that the act appropriating the money is unconstitutional, such assumption does not furnish justification for embezzlement of the funds in question, neither would it furnish justification to the defendant for diverting by means of forged instruments such funds from the channels to which they had been allocated.

In the recent opinion of *United States* v. *Seelig and Mesch Construction and Equipment Corp.* (S. D. N. Y., December 8, 1936), set out in the Appendix, *infra*, p. 31, the indictment, charging a violation of Section 35 of the Criminal Code, alleged that the defendants had submitted, in connection with work done under the Emergency Relief Appropriation Act of 1935, vouchers falsely stating the rates at which certain employees were paid. In refusing to countenance, as a possible defense, the invalidity of the Emergency Relief Appropriation Act, the court stated:

> I am in accord with the view expressed by the court in *Madden* v. *United States*. The

> result urged by the defendants would lead inevitably to gross frauds upon the Government. *Pressed to its logical conclusion, the defendants' thesis is that* whenever a specific appropriation by Congress has been made *under an unconstitutional statute, the fund appropriated becomes fair game for contractors dealing with the government, and is not within the protection of federal statutes designed for its protection.* Even if the fund here involved were improperly appropriated, the money, so long as it is within the control of the Treasury Department, remains the property of the United States and its expenditure, even for an illegal purpose, must necessarily be in accordance with pertinent rules and regulations, and the matter of their application to a governmental function under the jurisdiction of the department authorized to execute the legislation.

These cases exemplify the uniform course of decision on the problem. Other criminal cases involving conspiracy or fraud, and rejecting defenses grounded on the alleged invalidity of the Government's activities, include *Langer* v. *United States*, 76 F. (2d) 817, 824–825 (C. C. A. 8th) (conspiracy corruptly to administer Federal Emergency Relief Act and Act setting up the Reconstruction Finance Corporation); *United States* v. *Harding*, 81 F. (2d) 563 (App. D. C.) (conspiracy to deprive Government of money appropriated to Public Works Administration under the National Industrial Re-

covery Act); *United States* v. *Soeder,* 10 F. Supp. 944, 947 (W. D. Mo.) (conspiracy to defraud Government by violating provisions of Agricultural Adjustment Act); *United States* v. *Schor,* 13 F. Supp. 399, 401 (E. D. N. Y.) (presenting false claims in connection with project built in part with funds appropriated under National Recovery Act); cf. *Cagle* v. *United States,* 3 F. (2d) 746 (C. C. A. 6th) (conspiracy to defraud Government of title and possession to an automobile; held immaterial whether automobile had been obtained by legal or illegal seizure).

4. The *Langer* and *Harding* cases, *supra,* utilize a slightly different approach to the problem. As stated in *Harding* v. *United States,* 81 F. (2d) at 568:

> We answer this point as did the Circuit Court of Appeals in the Eighth Circuit, *Langer* v. *United States,* 76 F. (2d) 817, 824, that the gist of the offense charged is conspiracy, and the indictment being properly drawn under the conspiracy statute, the attack on the National Industrial Recovery Act is in the nautre of a collateral attack; and the indictment is good as a conspiracy indictment even though the National Recovery Act may be unconstitutional.

It is submitted that, in the present context, this doctrine of "collateral attack" constitutes merely a formulistic expression of the thesis that the substantive crime, the fraud upon the Government or the conspiracy to defraud, is punishable whether

or not the Government's activities were undertaken pursuant to a valid law. The concept is doubtless borrowed from the substantial body of authority to the effect that private corporations and municipal corporations created under, and public officers appointed under, an unconstitutional statute, are not wholly to be ignored, but constitute *de facto* corporations or *de facto* officers, whose title or lawful authority may not be attacked collaterally,[3] but may

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[3] See, e. g., *Smith* v. *Sheeley*, 12 Wall. 358 (*de facto* bank, organized under act of territorial legislature which was without any force or effect because not approved or confirmed by Congress). Many cases are collected in Field, The Effect of an Unconstitutional Statute, Introduction, chapters II, III, IV. It is not suggested that the cases are all uniform, and it is not denied that several cases attribute no legal effect whatever to an invalid enactment. See, e. g., Field, *passim*, and see pp. 43, 102. As typical of the cases giving some effect to a statute already declared unconstitutional, or without determination of its validity *vel non*, see, e. g., *City of Topeka* v. *Dwyer*, 70 Kan. 244 (person indicted for violation of ordinance may not attack statute authorizing addition of territory around his home to the municipal limits); *Smith* v. *Lynch*, 29 Oh. St. 261 (taxpayer may not enjoin collection of tax because board collecting the tax was established by an invalid ordinance); *Curtin* v. *Barton*, 139 N. Y. 505 (party to civil suit may not appeal on the ground that the trial judge was appointed to office under an invalid statute); *Ex parte Strang*, 21 Oh. St. 610 (same result in criminal case). It is not intended to suggest that "de facto" action may always be taken under an invalid law. Thus a defendant in a criminal case may not attack the validity of the statute governing the selection of the trial judge, but he may attack the statute creating the court or the office of the judge. Field, pp. 101 *et seq.* Such refinements do not obscure the fact that, at least in some situations, some legal cognizance will be taken of an unconstitutional statute.

be brought into question directly by appropriate officials, e. g., through a *quo warranto* action by the attorney general of the State. "Collateral attack" does not have precisely the same connotations as applied to an attack on a statute which does not also involve an attack on an official or corporate authority (which might more appropriately be attacked in an authoritative and direct proceeding). Yet it is apparent that similar considerations of policy may be pertinent to both types of cases.

Thus, analogous to the case at bar is *State* v. *Gardner,* 54 Oh. St. 24. The defendant was indicted for offering a bribe to a city commissioner. The defense was that the statute creating the city of which the commissioner was alleged to be an officer was unconstitutional, and there being no legal organization of the city or its government there could be no officer of the city to whom a bribe could be offered. The court held that the existence of the city or its government could not be attacked in such a case.[4] See 54 Oh. St. at 31:

> We think that principle of public policy, declared by the English courts three centuries ago, which gave validity to the official acts of persons who intruded themselves into an office to which they had not been

[4] But cf. *Kirby* v. *State,* 57 N. J. L. 320 (incumbent of office created by unconstitutional statute cannot be guilty of extortion), whose precedent value in its own jurisdiction is discussed and doubted, see Field, The Effect of an Unconstitutional Statute, p. 107.

legally appointed, is as applicable to the conditions now presented as they were to the conditions that then confronted the English judiciary. We are not required to find a name by which officers are to be known, who have acted under a statute that has subsequently been declared unconstitutional, though we think such officers might aptly be called "*de facto* officers." * * * Courts, in the practical administration of justice should regard the substance of things and deal with conditions as they actually exist. Here are grave and important official acts actually performed by virtue of an office, created under the provisions of a statute regularly enacted by that branch of the government to which the power to make law has been delegated by the constitution; there is a clearly established legal presumption of its validity. The public in its organized capacity as well as private citizens has acquiesced in and submitted to their authority. Such circumstances, the majority of the court are of opinion, are sufficient to give such color to their title as to make them *de facto* officers; but whether they fall within the previously existing definition of such officers or not, their official acts thus performed fall within the protection of that principle of public policy which defends them against collateral attack, and that, therefore, the question of the constitutionality of the statute in question was not before the court of common pleas.

5. The fundamental error of the formalistic opinion below lies in the breadth of its major premise, that the Agricultural Adjustment Act was "void ab initio" (R. 19).[5] Presumably the trial judge was invoking the well-known expression frequently excerpted from *Norton* v. *Shelby County,* 118 U. S. 425, 442:

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; *it is, in legal contemplation, as inoperative as if it had never been passed.* [Italics added.]

If the premise be accepted, the syllogism acquires a superficial persuasiveness. If no Agricultural Adjustment Act had ever been passed, perhaps it would not be "material" to any Government official whether the hogs he purchased were produced by the vendor or not.

But the statement that an unconstitutional statute must be viewed as if it had never been passed is not true in all contexts and for all purposes. It is not necessary here to inquire into the legal rights and duties which may arise by virtue of the enforcement and application of a statute later declared unconstitutional. It is certainly true that this Court will not shut its eyes entirely to the fact that a statute was passed and enforced, and that individuals and officials took action and made plans

[5] Although this expression was used only in the discussion of the first count of the indictment, it is apparent that this theory underlies the entire opinion.

with reference to the law on the books. In other words, the statute will be regarded, in an appropriate instance, as one of the *facts* in the case.

Authority for this view is to be found in *United States* v. *Realty Company,* 163 U. S. 427. That case involved two actions brought to obtain moneys by reason of Congressional legislation in regard to sugar bounties. The Tariff Act of 1890 provided for a bounty to be paid to producers of sugar produced in this country. This statute was repealed in 1894, and in 1895 Congress provided that a bounty should be paid to those producers and manufacturers who had complied with the 1890 law and had not yet been paid. The disbursing official declined to pay the bounty on the ground that the 1890 Act was unconstitutional, and that therefore there was no debt for which Congress could validly make an appropriation (by means of the 1895 statute) under its power to lay and collect taxes "to pay the debts" of the United States. This Court refused to decide whether or not the 1890 Act was void, and held that in any case the producers had claims of an equitable or moral nature which could validly be recognized by Congress. See pp. 438, 439:

> Being unconstitutional, there never was a moment, it is stated, when there was any valid act, and, therefore, no equities can arise in their favor because of any acts done by them upon the faith of the act, which they were bound to know was wholly void.

This reasoning does not exactly fit the case. It is not a question whether any strictly legal rights can arise out of an unconstitutional act. It is a question whether equitable considerations can attach to a claim which, among other grounds, is based upon an act that was supposed by all the officers of the government to be valid and which was repealed only when the whole taxing act of 1890 was subjected to a careful and comprehensive revision. There are occasions when the presumption that every man knows the law must be enforced for the safety of society itself. * * * But in such a case as this, *knowledge of the invalidity of the law in advance of any authoritative declaration to that effect will not be imputed to those who are acting under its provisions,* and receiving the benefits provided by its terms. These parties cannot be held bound, upon the question of equitable or moral consideration, to know what no one else actually knew, and what no one could know prior to the determination, by some judicial tribunal, that the law was unconstitutional. Although it should finally turn out that the law is invalid, and is so pronounced, yet during all the time of its operation, as has been stated, all the officers of the government united in treating it as a valid act. No court had determined to the contrary. It was a question at least admitting of argument. * * *

We are of the opinion that the parties, situated as were the plaintiffs in these ac-

> tions, acquired claims upon the government of an equitable, normal or honorary nature. * * * They are asserting that *by reason of the occurrences which took place before the appropriation, among which was the passage of the act of 1890,* they were so placed before Congress, as to authorize that body to recognize the equities of the situation, and to pay their claims which, while they were not of a legal character, were nevertheless of so meritorious and equitable a nature as to authorize the nation through its Congress to appropriate money to pay them. [Italics added.]

Unconstitutional though the 1890 law may have been, it was real enough to be considered as an "occurrence," or a fact in the case, supporting the conclusion that the sugar producers who had taken action in reliance on the statute, had an "equitable" or "moral" claim against the Government.

Similarly here, when the Agricultural Adjustment Act is viewed as one of the facts in the case, lending meaning to the actions and plans of the appellees, then their criminal responsibility, based upon the materiality of their representations, becomes obvious.

Within the meaning of the doctrines governing actions in fraud and deceit, a representation is "material" if it offers a motive sufficient to influence the conduct of a person of average intelligence, Bigelow, Fraud (1888) p. 497; *Hall* v. *Johnson,* 41 Mich. 286, 289, or if the representor is aware

that this statement, "though it would be utterly inoperative on the mind of any other person, will make all the difference in the world to the particular representee to whom he addresses it," Spencer Bower, Actionable Misrepresentation (1911) Sec. 128. Here the Agricultural Adjustment Act was in existence and had not yet been declared invalid. Appellees had knowledge of the regulations they desired to circumvent, which made it clear that the Field Auditor, whose duty it was to enforce the Act and approve the vouchers for payment, regardless of his opinion as to its constitutionality, would be influenced by the representation that appellees were the producers of the hogs sold. It seems obvious that their misrepresentation was a "material" one.

II

APPELLEES ARE ESTOPPED TO ATTACK THE CONSTITUTIONALITY OF THE AGRICULTURAL ADJUSTMENT ACT

Even if it be assumed that the success of a prosecution for a conspiracy to violate Section 35 of the Criminal Code is dependent upon the constitutionality of the Agricultural Adjustment Act, the appellees are estopped to assail the constitutionality of that Act.

It is well settled that one who has availed himself of the benefits of a statute is estopped to question its constitutionality. *Daniels* v. *Tearney*, 102 U. S. 415, 421; *St. Louis Co.* v. *Prendergast Co.*, 260 U. S.

469, 472–473. For purposes of this argument on demurrer it does not appear that the appellees received payments under the Agricultural Adjustment Act,[6] but the doctrine of estoppel applies as well to one who has not actually received benefits under a statute, but has taken action under the statute in quest of such benefits. Thus, apart from the rule that one may not both rely upon and assail an enactment in the same proceeding, *Hurley* v. *Commission of Fisheries*, 257 U. S. 223, 225, the constitutionality of a statute may not be attacked by one who has previously invoked the statute by taking steps or instituting proceedings in accordance with its provisions. *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581, 598–600; *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407, 411–412; *United Gas Co.* v. *Railroad Comm.*, 278 U. S. 300, 307–308; cf. *Booth Fisheries* v. *Industrial Comm.*, 271 U. S. 208.

In both the *Great Falls Mfg. Co.* and *Wall* cases a party who had instituted a proceeding prescribed by statute for the determination of damages suffered from the loss of property rights was held unable to maintain a separate suit attacking the constitutional sufficiency of the statutory proce-

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[6] The second count of the indictment does not disclose that appellees ever received a payment of benefits under the Agricultural Adjustment Act, [illegible] (R. 11–15). The first count, which avers that pigs were sold to the agents of the Secretary of Agriculture at premium prices (R. 5), is not before the Court on this appeal.

dure to provide adequate remuneration, though the proceedings had not yet culminated in an award, and no benefits had been received. In the *United Gas Co.* case, because a gas company had petitioned a state commission to establish higher rates or permit withdrawal from service, it was held unable, in a suit to set aside the commission's order denying it relief, to assail the statute creating the commission, or the statute prohibiting any public service company which had continued its service after the expiration of its franchise partially to withdraw from such service without permission of the commission.

It is true that in *Buck* v. *Kuykendall*, 267 U. S. 307, the Court directed that the enforcement of a Washington statute, making a certificate of convenience and necessity a prerequisite to the use of the highways by a common carrier operating purely in interstate commerce, be enjoined at the instance of one who had applied, in vain, for such a certificate. The Court stated (pp. 316–317) that the doctrine of estoppel was not applicable, though the carrier had invoked the exercise of the power now assailed, because the carrier had neither received any benefit, nor was it relying on the statute and attacking it in the same proceeding. The case may be open to the distinction that the statute, delimiting the freedom to engage in the transportation business, was wholly burdensome as to carriers, and could not possibly confer any benefits. But

the approach of the case seems to be at variance with the cases just discussed.[7]

On principle as well as authority it seems that a party should not be able to assume inconsistent positions,[8] first to rely on a statute and later to assail it, even though he has failed to secure the benefits which he sought under the statute. It is believed that the correct doctrine is that stated in the more recent decision of *United Gas Co.* v. *Railroad Commission,* 278 U. S. 300, 307–308:

> It is the rule of this Court, consistently applied, that one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the result, assail their action on the theory that the statutes under which the action was taken offend against the Constitution of the United States. * * *

---

[7] In *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581, the Court emphasized the inconsistency of the corporation's position: it had previously acquiesced in the taking of the property, and the procedure before the Court of Claims; it could not now bring a suit proceeding on the ground that there had been no lawful taking (pp. 598, 600). The Court stated that the corporation should have stood upon its constitutional rights in the first place, if it desired to urge them (p. 600). See *infra,* footnote 6. In *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407, the Court stated (p. 412): "They cannot claim the benefit of statutes and *afterwards* successfully assert their invalidity." [Italics added.]

[8] The power to claim a constitutional right may be barred "by deliberate election or by conduct inconsistent with the assertion of such a right." *Pierce Oil Co.* v. *Phoenix Refining Co.,* 259 U. S. 125, 128–129.

The indictment sets out that appellees conspired to obtain benefits under the Agricultural Adjustment Act, and that they caused to be presented to the Field Auditor appointed by the Secretary of Agriculture vouchers for approval and payment by the United States. Having thus invoked the Act, by action designed to secure benefits under the Act, they are estopped to attack its validity.

None of the factors in the instant case precludes the application of the doctrine of estoppel. It applies to Federal as well as State statutes. *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581; *American Bond & Mortgage Co.* v. *United States,* 52 F. (2d) 318, 321 (C. C. A. 7th); see *Hirsh* v. *Block,* 267 Fed. 614, 618 (App. D. C.), reversed on another ground, 256 U. S. 135; cf. *Humbird* v. *Avery,* 195 U. S. 480. It applies notwithstanding the fact that the Agricultural Adjustment Act is concededly unconstitutional in several aspects, *United States* v. *Butler,* 297 U. S. 1. In *Daniels* v. *Tearney,* 102 U. S. 415, the Court declared a statute invalid (pp. 418–419) and yet held that there was an estoppel to aver its unconstitutionality (pp. 421–422). It applies notwithstanding the fact that a criminal prosecution is involved, where the defendant has accepted the benefits of or invoked the statute.[9] *Kluczek* v. *State,* 115 N. J. L. 105, 111;

[9] In addition may be cited several criminal cases precluding a defendant from relying on and assailing the statute in the same proceeding. *Hunt* v. *State,* 186 Ind. 644; *State* v. *Collins,* 225 Mo. 633; *Ayers* v. *Newark,* 49 N. J. L. 170; *State* v. *Board of Police Com'rs,* 56 N. J. L. 258.

Ingles v. *People,* 90 Colo. 51, 56–57; *Jannett* v. *Windham,* 109 Fla. 129, 130;[10] *State* v. *Stone,* 46 La. Ann. 147, 150.[11]

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded with instructions to overrule the demurrer.

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BRIEN MCMAHON,
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W. W. BARRON,
Special Assistant to the Attorney General.

JOHN M. SULLIVAN,
Attorney.

HAROLD LEVENTHAL,
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NOVEMBER 1937.

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[10] On rehearing, as an alternative ground of decision, the state court examined the statute and held it consonant with the Federal Constitution, and on this ground the judgment was affirmed, 290 U. S. 602.

[11] The court held that a defendant who had furnished samples of milk without objection could not attack the provision of a milk ordinance requiring dairymen to furnish free samples or attack the regularity of the execution of the ordinance, but it did permit him to attack the separate provision punishing the sale of adulterated milk.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 99–6

UNITED STATES OF AMERICA, PLAINTIFF

v.

M. C. SEELIG AND MESCH CONSTRUCTION AND EQUIPMENT CORP., DEFENDANTS

OPINION

KNOX, D. J.

This is a demurrer to an indictment in nine counts, each charging violation of Criminal Code, Section 35, 18 U. S. C. A., Section 80. The defendants have been indicted for submitting to the Treasury Department, Procurement Division, false vouchers for services rendered, viz, renting of equipment and furnishing personnel to the Treasury Department, Procurement Division, for work under the Emergency Relief Appropriation Act of 1935. The Treasury Department's invitations to bid required specifications stating the wages to be paid personnel. These specifications were part of the contract. In submitting their bids, the defendant proposed to pay their engineers $1.50 per hour and their drill runners $1.10 per hour, plus compensation insurance. The Treasury Department accepted defendants' bids for services in connection with the construction of the foundation of a

library at City College, and on the removal of street car tracks on Madison Avenue and on Central Park West, New York City. Thereafter, defendants submitted bills, receipts, vouchers, etc., to the Treasury Department in which certification was made that defendants had paid the two classes of personnel at the rates agreed upon in the contracts. These claims presented have been partially paid by the Treasury Department. The government charges that the papers mentioned in the indictments and submitted to the Department, as charged therein, were false, and known to be false in that defendants had paid their personnel substantially less than was represented to the Treasury Department.

The statute under which this prosecution is brought reads as follows:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any

> fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder shall be fined not more than $10,000., or imprisoned not more than ten years, or both. (As amended June 18, 1934, c. 587, 48 Stat. 996.)

The principal ground of the defendants' demurrer is that Criminal Code, Section 35, 18 U. S. C. A., Section 80, as construed with sections 1 and 7 of The Emergency Relief Appropriation Act of 1935, is inapplicable to defendants' transactions with the Treasury Department; if, however, the acts are applicable, they are unconstitutional because they are beyond the powers delegated to Congress by the Constitution or because they purport to delegate legislative power to the President of the United States. The defendants also contend that the indictment fails to state facts sufficient to constitute a crime. The defendants stress the phrase "matter within the jurisdiction", contending that the statute under which the contracts were made, viz., The Emergency Relief Appropriation Act of 1935, is invalid, and therefore the matter cannot be "within the jurisdiction" of the Treasury Department.

In *Madden* v. *United States,* 80 Fed. (2d) 672, the defendant, appealing from a conviction for forging certain assignment cards used by the Civil Works Administration, contended that Title II of The National Industrial Recovery Act was unconstitutional. The court, in affirming the conviction, said:

> Counsel for the appellant stresses the point in argument that the provisions of the

> National Industrial Recovery Act are unconstitutional and that Congress has no constitutional authority under the public welfare clause to set up a bureau or agency for the expenditure of federal funds for purely state or municipal projects such as to pay employees for cataloguing books in the Boston Public Library.
>
> There seems to be some diversity of opinion as to the constitutionality of this law (citing cases); but this is not a question which we must decide, for if we were to assume that the act appropriating the money is unconstitutional, such assumption does not furnish jurisdiction [*sic*] for embezzlement of the funds in question, neither would it furnish justification to the defendant for diverting by means of forged instruments such funds from the channels to which they had been allocated.

The Supreme Court denied certiorari, 56 Supreme Court 502.

I am in accord with the view expressed by the court in *Madden* v. *United States*. The result urged by the defendants would lead inevitably to gross frauds upon the Government. Pressed to its logical conclusion, the defendants' thesis is that whenever a specific appropriation by Congress has been made under an unconstitutional statute, the fund appropriated becomes fair game for contractors dealing with the government, and is not within the protection of federal statutes designed for its protection. Even if the fund here involved were improperly appropriated, the money, so long as it is within the control of the Treasury Department, remains the property of the United States and its expenditure, even for an illegal purpose, must nec-

essarily be in accordance with pertinent rules and regulations, and the matter of their application to a governmental function under the jurisdiction of the department authorized to execute the legislation.

In *United States* v. *Schor,* 13 Fed. supp. 399, a case very similar to the instant prosecution, the court said:

> * * * the exercise of an administrative function, i. e., jurisdiction, on the part of an agency of the United States was recognized as a necessary consequence of entering into and carrying out the contract, into which these defendants entered.
>
> If the foregoing reflects a correct understanding of the necessary incidents of the contract which gave rise to the defendants' claims for payments, it follows that they intended to and did submit themselves to the exercise of jurisdiction by an agency of the United States, when they filed the certificates, vouchers and bill which they knew to be false, and that this court had jurisdiction of the offense charged.

It thus becomes unnecessary to pass upon the constitutional issues proposed by the defendant.

The demurrer is overruled.

DECEMBER 8, 1936.

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INDEX

	Page
Statutes involved	1
Statement	2
Argument:	
I. The decision below is not based on a construction of indictment, but involves a question of statutory construction	3
A. The decision is not based upon any alleged absence in the indictment of a showing of pecuniary loss	3
B. The opinion below is based upon a construction of "material fact" as used in Section 35, Criminal Code	11
II. The decision below is based upon a construction of the statute upon which the indictment is founded	12
Conclusion	16

26481—37

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 97

THE UNITED STATES OF AMERICA, APPELLANT

v.

BEN KAPP, BERT COX, TOM WOODS, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FROM THE WESTERN DISTRICT OF OKLAHOMA

REPLY BRIEF ON BEHALF OF APPELLANT

In view of the order of October 11, 1937, noting probable jurisdiction in this cause, the Government did not add to its opening brief an exposition of the jurisdiction of this Court. However, since the brief submitted by the appellees addresses itself principally to that question, the Government submits this reply brief.

STATUTES INVOLVED

Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, 19 U. S. C., title 18, sec. 682:

A writ of error [1] may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.

Judicial Code, sec. 238, U. S. C., title 28, sec. 345:

A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise: * * * (2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.

STATEMENT

By way of preliminary, the Government wishes to clarify the nature of the representation made by appellees. They represented to the Chicago Commission firms that the various producers of the pigs were still the owners thereof, whereas in fact the pigs had been acquired outright by appellees and were owned by them. The Government desires to

[1] The writ of error has been abolished and appeal substituted therefor. Act of Jan. 31, 1928, c. 14, 45, Stat. 54, as amended by Act of April 26, 1928, c. 440, 45 Stat. 466; U. S. C., title 28, secs. 861a, 861b.

modify any statements in its opening brief which indicate a different view of the facts.[2]

ARGUMENT

I

THE DECISION BELOW IS NOT BASED ON A CONSTRUCTION OF THE INDICTMENT, BUT INVOLVES A QUESTION OF STATUTORY CONSTRUCTION

A. *The decision is not based upon any alleged absence in the indictment of a showing of pecuniary loss*

Appellees contend that the decision below rests upon the ground that the indictment did not sufficiently allege that the conspiracy contemplated any pecuniary loss to the Government.

The Government does not deny that, under the ruling of *United States* v. *Cohn,* 270 U. S. 339, a conspiracy to violate Sec. 35 of the Criminal Code must relate to a "fraudulent causing of pecuniary

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[2] Thus the phrase "pretending to be the original producers" (Opening Brief, p. 6, line 3) should be omitted. The last sentence of Point I of the summary of argument (Br. —, p. 8) should read: "In view of these facts the representation made by appellees that the hogs to be sold to the Secretary of Agriculture were owned by the producers was clearly "material" within the meaning of Section 35 of the Criminal Code. And the second full sentence on page 25 of the Brief should read: "Appellees had knowledge of the regulations they desired to circumvent which made it clear that the Field Auditor, whose duty it was to enforce the Act and approve the vouchers for payment, regardless of his opinion as to its constitutionality, would be influenced by the representation that the hogs to be sold were then owned by the producers.

or property loss" (p. 347). The Government does insist that careful scrutiny of the entire record discloses that the indictment sufficiently demonstrates that the conspiracy contemplated pecuniary loss to the Government, and further reveals that neither the parties nor the court below even considered this "pecuniary loss" factor as a possible ground of decision.

First. The indictment clearly sets out facts showing the pecuniary loss to the Government contemplated by the conspiracy. Under the Secretary's regulations (R. 8–9), in effect during the Emergency Hog Marketing Program, "benefit payments" were made to original producers, but not to registered market traders or speculators, by means of a purchase of pigs at a "premium price" (R. 9, 10, 11, 12). The purchase of pigs at a "premium price" greater than the market price was executed not as a means of securing pigs, whose disposition only raised a harassing problem which was solved by donations to the poor on relief,[3] but as a means of paying benefits to the depressed agricultural producers. The nature of the pecuniary loss planned by the conspirators is clear: The Government, intending to lend assistance to a largely indigent class would have been duped into a gift to an entirely different class, one of speculators who were not intended to be aided.

[3] See *Emergency Hog Marketing Program*, Report to the Senate by the Secretary of Agriculture, S. Doc. No. 140, 73d Cong., 2d Sess., p. 14.

The fraud and loss are as real as that worked on a citizen who is induced to give money, allegedly for a charitable cause, to one who intends all the while to devote the money to an entirely different purpose. Reference may appropriately be made to the reasoning of the Court in *Janes et al.* v. *Trustees of Mercur University,* 17 Ga. 515, 519–520:

> When, therefore, on application to one for a donation to such a school, a representation is made to him that the school is to be a manual labor school, the representation is one of a material kind. If, therefore, the representation be acted upon and a donation made, and then the manual labor part of the school be abolished, an injury, by means of the false representation, is inflicted on the donor. ***He is deprived of his money.*** The transaction amounts to a fraud on him. [Italics added.]

But appellees contend that the indictment does not show that the Government paid more than the market price (Br. p. 11). Apart from the inherent improbability of a suggestion that appellees arranged the elaborate conspiracy and misrepresentations for the purpose of obtaining a price which they could have secured directly on the open market, it is clear from the indictment that the Secretary, in purchasing hogs for his own account, paid more than the current market price. The indictment sets out that the Secretary was making "benefit payments," and promulgated regulations

to assure that the benefit payments would reach the producers. Reference is repeatedly made to purchases at a premium price" (R. 9, 10, 11). This is not a conclusion of law phrased merely in the generic terms used to define the offense, see *United States* v. *Cruickshank,* 92 U. S. 542, 558, 559, such as might be a bare, unexplained statement that the conspirators proposed to cause the Government "pecuniary or property loss," but it is a statement of the fact that the Secretary paid to producers prices which constituted a premium,[4] or bounty, i. e., prices higher than the current market price. Had appellees urged this matter in the lower court, or submitted a bill of particulars, the United States could have offered more detailed allegations on the point. For the fact is clear, and from sources which may be judicially noticed: The Secretary was paying more than the commercial market price.[5] Appellees' suggestion that

[4] The primary meaning of the word "premium", as defined in Webster's New International Dictionary (2d ed. 1936), p. 195, includes: "1. A reward or recompense; * * * bounty; as a *premium* for good behavior or scholarship, for discoveries, etc."

[5] See *Emergency Hog Marketing Program*, Report to the Senate by the Secretary of Agriculture, S. Doc. No. 140, 73d Cong., 2d Sess., passim. An economic appraisal by Administration officials pointed out that "The purchase of light pigs and sows at a price well above the prevailing market will add to the farmers income. * * *" *Id.*, p. 17. And so the plan called for purchase of "light-weight hogs weighing from 25 to 100 pounds at premium prices established by the Administration." *Id.*, p. 18. See also *Corn-Hog Ad-*

"There is nothing in the indictment alleging the Government paid more than its own price for the hogs it got" (Br. p. 11), continues the error of

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justment (issued by Agricultural Adjustment Administration, Jan. 1935), p. 37.

The Secretary's schedule of prices, Chicago basis, was $9.50 per cwt. for pigs weighing from 25–30 lbs., $9.25 per cwt. for 31–35 lb. pigs, etc., with $.25 per cwt. less for each additional 5 lb. group. The lowest price was $6.00 per cwt. for pigs from 96 to 100 lbs. *Id.*, p. 20. The indictment sets forth that appellees' pigs were invoiced at $9.00 per cwt. 36–40 lb. pigs), $8.75 per cwt. (41–45 lb. pigs), $8.50 per cwt. (46–50 lb. pigs), $6.75 per cwt. (81–85 lb. pigs). (R. 12, 13, 14.) With these prices should be contrasted the commercial market price for light pigs weighing from 100 to 130 pounds. On the dates when appellees' shipments were invoiced, September 11, 12, 16, 1933, the commercial market prices were $2.50–$3.75 (September 11, 1933), $2.75–$3.85 (September 12, 1933), $3.25–$4.25 (September 15, 16, 1933). *Daily Livestock Market Report*, Chicago, for September 11, 1933, September 12, 1933, September 15, 1933, issued by Bureau of Agricultural Economics, Department of Agriculture. At all times mentioned the Secretary was paying $6.00 per cwt. for 100-lb. pigs.

It should be noted that the daily reports disclose that on the commercial market the price per cwt. varies directly with the weight of the pig; for processing purposes the lighter pigs are considered less economical to handle. See *Report on Emergency Hog Marketing Program*, S. Doc. No. 140, 73d Cong., 2d Sess., p. 32; *Agricultural Adjustment*, Report of Administration of the Agricultural Adjustment Act May 1933 to February 1934 (U. S. Dept. of Agriculture, 1934), p. 110. The Secretary reversed this rule and increased the price per cwt. as the total weight of the pig went down, because he desired to reduce the supply of mature hogs on the subsequent winter market (and increase the price), rather than to prepare them for commercial use. *Report on Emergency Hog Marketing Program*, S. Doc. No. 140, 73d Cong., 2d Sess., p. 13.

26481—37—2

regarding the transaction simply as a purchase of hogs, rather than as a grant of benefits. The Secretary's regulations explicitly withhold the benefit of premium prices from non-producers.

Second. The demurrer,[6] which may be supposed to have suggested to the district court the ground of its opinion, does not advert to this matter, although it sets out several other specific objections to the indictment—duplicity in charging more than one offense; failure to show any common action between the defendants; failure to charge acts constituting an offense in view of the invalidity of the Agricultural Adjustment Act and of the regulations promulgated thereunder by the Secretary of Agriculture; lack of territorial jurisdiction of the trial court. The only ground which might conceivably embrace the contention now made is the preliminary, catch-all objection that the indictment is not "sufficient in law."

Third. The District Judge, who signed the order allowing appeal (R. 22–23), did not proceed upon a construction of the indictment as suggested by appellees. Utilizing a ground suggested by the demurrer,[7] the District Court rested on the failure

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[6] Reference here is made to the demurrer of defendants Cox, Hopper, Woods and Green (R. 15, 17–18). The demurrer filed by McLarty states merely that the indictment fails to state facts constituting an offense (R. 15). Kapp filed no demurrer, but the district court viewed the case as if he had filed one, and sustained his demurrer along with the others (R. 20–21).

[7] Paragraphs 4, 5, 6; R. 17–18.

of the indictment to charge an offense,[8] in view of the invalidity of the Agricultural Adjustment Act. No mention is made of a failure to allege or show pecuniary loss to the Government. A sentence to the effect that the hogs were shipped, and that the bills were otherwise correct (R. 20), was designed merely to narrow the issue, and to focus on the crucial representation relied on by the Government. It is true, as the District Judge states, that the bills would have been entirely correct had the representation that the pigs were sold by the original producers been correct.

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[8] Despite appellees' elaborate analysis, it is clear that this holding alone demonstrates that a question of statutory construction is involved. Where the district court holds that the acts charged do not constitute a violation of a statute, the Court has necessarily construed the statute, and a direct appeal lies. *United States* v. *Patten*, 226 U. S. 525, 535; *United States* v. *Birdsall*, 233 U. S. 223, 230; *United States* v. *Nixon*, 235 U. S. 231, 235; *United States* v. *Mosley*, 238 U. S. 383; *United States* v. *Cohn*, 270 U. S. 339, 342–343. The rule would apply to a ruling quashing a murder indictment because of the omission of an allegation of malice aforethought. The construction would be that the murder statute requires malice aforethought as an element of the offense: The construction would be obviously correct, and an appeal to review it might be dismissed as frivolous, but there would be a "construction" of the statute below. Indeed, appellees do not really deny that the sustaining of the demurrer for failure to charge an offense constitutes a construction. Their contention is that the only construction involved is the interpretation of Section 35 to require pecuniary loss, a question settled by *United States* v. *Cohn*, 270 U. S. 339. With that contention the Government, of course, disagrees.

The short answer to the contention that the court below relied on the lack of "pecuniary loss" is the fact that it relied on the unconstitutionality of the Agricultural Adjustment Act. Whether or not the Act was valid, the conspirators, if successful, would have obtained the same price for their hogs. Whether or not the Act was valid, the pecuniary loss to the Government was exactly the same. Since the court below relied on the unconstitutionality of the Act, it could not have relied on an alleged absence of pecuniary loss.[9]

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[9] Although the Government insists that the District Court did not rely on any pecuniary loss feature, the Government contends that even if the District Court had sustained the demurrer on this ground, there would be a question for this Court to review. The appellees apparently assume (Br. p. 6) that such a ruling would be a construction of the indictment, binding on this Court. It is true that this Court is bound by the District Court's interpretation of the meaning of an indictment, i. e., the determination as to precisely what facts were alleged therein. See *United States* v. *Yuginovich*, 256 U. S. 450, 461; *United States* v. *Colgate & Co.*, 250 U. S. 300, 306; *United States* v. *Davis*, 231 U. S. 183, 187. However, in this case there would be no real question as to what facts were charged in the indictment. The Secretary was clearly buying pigs at prices higher than commercial market prices. The Government concedes that if the conspiracy had been successful, the Secretary would have received pigs of the weight and soundness represented. But if, on the basis of the latter fact, the District Court had determined that no "pecuniary or property loss" had been caused, this would have been a ruling of law on conceded facts, a ruling construing an element of the offense defined by Section 35, an element read into the statute by *United States* v. *Cohn*, 270 U. S. 339, 347, *supra*. If the District Court had adopted this ground, the proper construction of "pecuniary or property loss" would have

Apparently, appellees attempt to link their theory of the case to the District Court's reliance on the unconstitutionality of the Act by stating that "if it [the Government] could do nothing even with the *right* hogs, it has sustained no pecuniary loss in getting the wrong ones." (Br., p. 11). This passage is obscure. The District Court nowhere intimated that the Government was powerless to use hogs it purchased from producers. Moreover, it may be admitted that hogs purchased from producers and from speculators have the same hog value, even in the possession of the Government. As explained above, the pecuniary loss comes not from any deficiency in the hogs shipped, but from the fact that appellees attempted to induce the Government to grant benefits to members of a class the Government did not wish to aid.

B. *The opinion below is based upon a construction of "material fact" as used in Section 35, Criminal Code*

The brief opinion of the District Court tersely states the *ratio decidendi* (R. 20):

> This [fact that the hogs did not originate from the sources represented by the defend-

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been subject to review in this Court, and the Government could have presented its argument to the effect that the "pecuniary loss" would have come, not from a deficiency in the hogs shipped, but from the fact that the hog purchase was merely a means of giving bounty to producers and that the conspiracy contemplated that the Government would be duped into granting benefits to members of a class the Government did not desire to assist.

> ants] ceases to be a *material fact,* if the provisions of the Agricultural Adjustment Act are void. In other words, the representations, which are alleged to have been made, cease to be misrepresentations of *material facts* when the act itself falls. [Italics added.]

The use of the expression "material fact" obviously refers to the requirement of Section 35 of the Criminal Code, which punishes one who shall willfully "falsify * * * a material fact." The major premise of the opinion is that facts which are "material" only by virtue of a statute, may not be considered material if the statute is invalid. It is this construction of "material fact", as used in Section 35, of which the United States complains.[10]

II

THE DECISION BELOW IS BASED UPON A CONSTRUCTION OF THE STATUTE UPON WHICH THE INDICTMENT IS FOUNDED

Appellees contend (Br., p. 3) that the indictment is founded on Section 37 of the Criminal Code (conspiracy statute), whereas the construction below is of Section 35 of the Criminal Code.

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[10] The estoppel point in appellant's opening brief also involves a question of construction, though a question of construction not considered by the court below. Under this point, appellant is in effect urging that in any event "material fact" should be construed to embrace any fact made material by a statute which, though unconstitutional generally, cannot be attached by the person who made the misrepresentation.

Sufficient reply is found in the long line of cases involving indictments for conspiracy (under Section 37) to commit a substantive offense defined in another act. In each of these cases this Court unhesitatingly reviewed decisions construing the statute defining the substantive offense, and itself considered the correct interpretation thereof. *United States* v. *Keitel,* 211 U. S. 370; *United States* v. *Forrester,* 211 U. S. 399; *United States* v. *Herr,* 211 U. S. 406; *United States* v. *Biggs,* 211 U. S. 507; *United States* v. *Stevenson,* 215 U. S. 200; *United States* v. *Munday,* 222 U. S. 175; *United States* v. *Davis,* 231 U. S. 183; *United States* v. *Foster,* 233 U. S. 515; *United States* v. *Holte,* 236 U. S. 140; *United States* v. *New South Farm,* 241 U. S. 64; *United States* v. *Morehead,* 243 U. S. 607; *United States* v. *Hutto,* 256 U. S. 524; *United States* v. *Janowitz,* 257 U. S. 42; *United States* v. *Bowman,* 260 U. S. 94; *United States* v. *Walter,* 263 U. S. 15. The last two cases are especially significant, for they involved conspiracies to violate Section 35 of the Criminal Code.

Appellees suggest that all these cases assumed jurisdiction without perceiving the problem now raised. However, several of these opinions seem to have envisioned the question now presented, and to have made adequate preparation for it. The applicable doctrine suggested by these cases is that an indictment for conspiracy to commit an offense is "founded," within the meaning of the Criminal

Appeals Act, both on Section 37 and on the statute defining the substantive offense contemplated by the conspiracy, although the applicable punishment is that provided in Section 37 alone.

Thus, in *United States* v. *Bowman,* 260 U. S. 94 (indictment for conspiracy to defraud under Section 35), Chief Justice Taft stated, in the course of his opinion (p. 100): "What is true of these sections in this regard is true of *Section 35, under which this indictment is drawn.*" (Italics added.) Similarly, in *United States* v. *Walter,* 263 U. S. 15, Justice Holmes, who referred to the third count of an indictment as "based upon Section 37 of the Criminal Code" stated (p. 16–17) that "the first two counts are brought under the Act of October 23, 1918, c. 194; 40 Stat. 1015, *amending Section 35 of the Criminal Code and, taken with Section 37,* making it a crime to conspire to present for, or to obtain, payment of a fraudulent claim against 'any corporation in which the United States of America is a stockholder.'"

The same reasoning is suggested in *United States* v. *Foster,* 233 U. S. 515, 523 (indictment referred to as "being based on Section 206 of the Criminal Code"); *United States* v. *Janowitz,* 257 U. S. 42, 46–47 ("facts * * * are sufficient to constitute crimes under Sections 37 and 148 of the Criminal Code * * * properly construed").

Even upon the assumption that the indictment was "founded" on Section 37, compare *United*

States v. *Hutto,* 256 U. S. 524, 525,[11] this Court would have jurisdiction to review the same questions as could be presented on the assumption that the indictment was founded on both §§ 35 and 37. Section 37 prohibits a conspiracy to commit an offense against the laws of the United States. It is apparent that a proper construction of "offense against the laws of the United States" may require a preliminary construction of the statute defining the offense. See *United States* v. *Stevenson,* 215 U. S. 200, 203;[12] *United States* v. *Morehead,* 243

[11] The Court stated that it has issued a writ of error under the Criminal Appeals Act to review an order sustaining a demurrer to an indictment *under Section 37, Criminal Code,* charging a conspiracy to violate Section 2078, Rev. Stats. * * * *." [Italics added.]

[12] "Inasmuch as we have already held that Congress, in making the assistance of contract laborers into the United States a misdemeanor, has made the same a crime indictable as such under the Immigration Act of 1907, it must necessarily follow that if two or more persons, as is charged in the indictment under consideration, conspire to assist such importation, they do conspire to commit an offense against the United States within the terms of Section 5440 of the Revised Statutes of the United States."

U. S. 607.[13] In this case the indictment under Section 37 could be dismissed only because it failed to show a conspiracy to commit an "offense," under Section 35. The construction of Section 35 is integrally involved in a proper construction of Section 37, and an appellate review of the construction of Section 37 would entail a construction of Section 35.

The statements of this Court tend to indicate that a conspiracy indictment is "founded" on the statute defining the substantive offense as well as on Section 37. But it is apparent that, whichever is the correct theory with respect to the statute on which the indictment is "founded", this Court can review the construction of "material fact" as used in Section 35.

CONCLUSION

For the reasons stated, it is submitted that, under the Criminal Appeals Act of 1907, the Court has jurisdiction to review the cause, and to determine the issues presented in the Government's

[13] In this case the existence of a conspiracy to commit subornation of perjury (Sec. 126, Criminal Code) depended on whether or not an oath in a false affidavit was "authorized to be administered," which in turn depended on the validity of a regulation issued under the Homestead Law, authorizing the oath. To determine the question the Court enunciated the proper construction of the Homestead Law. It would seem probable that the Homestead Law was not the statute upon which the indictment was founded, and that it was being construed merely as a step in the proper construction and application of Sec. 126.

opening brief, and that accordingly the judgment of the District Court should be reversed and the cause remanded with instructions to overrule the demurrer.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1937

No. 97

United States of America, *Appellant*

v.

Ben Kapp, et al.

Appeal from the District Court of the United States for the Western District of Oklahoma

BRIEF FOR APPELLEES

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INDEX.

	Page
Questions Presented	1
Outline of Argument	2
Argument:	
I. If any statute at all was construed below it was not the statute on which the indictment was founded (Section 37 Cr. C.) but the claims statute (Section 35 Cr. C.)	3
II. The Court below has construed the indictment, not the statute	5
III. Assuming the jurisdiction, the only question involved is whether the alleged misrepresentation was as to a material matter, as to which the Government's authorities are unconvincing	12
Conclusion	15

CASES CITED.

	Page
Haas v. Henkel, 216 U. S. 426	6
Langer v. U. S., 76 F. (2d) 817	13
Madden v. U. S., 80 Fed. (2d) 672	13
U. S. v. Biggs, 211 U. S. 507	5
U. S. v. Birdsall, 233 U. S. 223	7
U. S. v. Bowman, 260 U. S. 94	5
U. S. v. Carter, 231 U. S. 492	4
U. S. v. Cohn, 270 U. S. 339	5, 7, 9
U. S. v. Colgate & Company, 250 U. S. 300	6
U. S. v. Cruickshank, 92 U. S. 542	11
U. S. v. Davis, 231 U. S. 183	5, 6
U. S. v. Dickinson, 213 U. S. 92	4
U. S. v. Ferger, 250 U. S. 207	5
U. S. v. Forrester, 211 U. S. 399	5
U. S. v. Foster, 233 U. S. 515	5
U. S. v. Halsey, Stuart & Company, 296 U. S. 451	4
U. S. v. Harding, 81 F. (2d) 563	13

U. S. v. Hastings, 296 U. S. 188 ..... 4, 6, 11
U. S. v. Herr, 211 U. S. 406 5
U. S. v. Holte, 236 U. S. 140 5
U. S. v. Hutto, 256 U. S. 524 5
U. S. v. Janowitz, 257 U. S. 42 5
U. S. v. Keitel, 211 U. S. 370 ..... 4, 5
U. S. v. McDonald, 10 Fed. Sup. 948 12
U. S. v. Morehead, 243 U. S. 607 5
U. S. v. Mosley, 238 U. S. 383 ..... 7, 9
U. S. v. Munday, 222 U. S. 175 5
U. S. v. New South Farm and H Company, 241 U. S. 64 5
U. S. v. Nixon, 235 U. S. 231 ..... 7, 8
U. S. v. Pacific & Arctic R. and Nav. Co., 228 U. S. 87 5
U. S. v. Patten, 226 U. S. 525 ..... 5, 7
U. S. v. Scharton, 285 U. S. 518 5
U. S. v. Schor, 13 F. Supp. 399 14
U. S. v. Seelig & Mesch Co. (S. D. N. Y. Appendix Goy. Brief) 13
U. S. v. Soeder, 10 F. Supp. 944 14
U. S. v. Stevenson, 215 U. S. 200 5
U. S. v. Walter, 263 U. S. 15 5
U. S. Winslow, 227 U. S. 208 5
U. S. v. Yuginovich, 256 U. S. 450 6

STATUTES CITED.

Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C. Title 18, Sec. 682) 2, 3
Sec. 35, 35 Stat. 1095, as amended by the Act of October 23, 1918, ch. 194, 40 Stat. 1015 (U. S. C. Title 18 Sec. 80) 3
Sec. 37 (U. S. C. Title 18, Sec. 88) 3

IN THE

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United States of America, *Appellant*

v.

Ben Kapp, et al.

Appeal from the District Court of the United States for the Western District of Oklahoma

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BRIEF FOR APPELLEES

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under the Criminal Appeals Act where the lower Court upon a charge of conspiracy under Sec. 37 Cr. C, by making false representations in violation of Sec. 35 Cr. C., has failed to construe Sec. 37, the conspiracy Statute on which the indictment was founded, but, if it has construed any Statute at all, has construed Sec. 35 Cr. C., relating to false claims.

2. Whether the Court below has construed any Statute at all or only the indictment.

3. Whether, the Court below having held that the facts charged in the indictment do not involve a pecuniary fraud

under a Statute held by this Court to require one, does an alleged misrepresentation as to a matter beyond the control of Congress relate to a material matter?

OUTLINE OF ARGUMENT

This Court's jurisdiction to review a decision sustaining a demurrer being limited to a case wherein such a decision was "based upon the construction of the statute upon which the indictment was *founded*," (Criminal Appeals Act, 18 U. S. C. A. Sec. 682), this Court has no jurisdiction where the case below involved a conspiracy under Sec. 37 to violate Sec. 35 by making false representations and where the decision below, if it construed any statute at all did not construe Section 37, on which the indictment was founded, but Sec. 35, relating to false claims.

The Court below in holding that the facts charged do not involve a pecuniary fraud under a statute held by this Court to require one and that hence an alleged misrepresentation as to a matter beyond the control of Congress did not relate to a material matter, has construed the indictment, not the statute. Whether the Court below was right or wrong its decision that the indictment charged no pecuniary fraud is binding on this Court. The frequently expressed statement that where the District Court has held that the acts charged did not fall within the condemnation of the statute, the Court necessarily construed the statute is true only of those cases wherein there is some dispute as to the meaning or scope of the statute, as for instance where there is an attempt to apply it to a new state of facts. Where, as in the present case, there is no dispute that section 35, the False Claims Statute, requires a monetary fraud (this Court having settled the point) the Court below has simply held that the facts alleged in the indictment state no element of monetary fraud and this construes the indictment, not the statute.

Assuming this Court has jurisdiction, the question presented is not the broad question of the quasi-validity of governmental actions under an unconstitutional statute but the narrow inquiry as to whether, when the Court below has found that the indictment does not charge a monetary fraud under a statute which this Court has held requires one, a misrepresentation as to the origin of the hogs sold the government is a material misrepresentation. The Court below having held that there was no element of pecuniary fraud alleged in the indictment, it necessarily follows that any misstatement as to the origin of the hogs did not relate to a material matter.

I

If any Statute at all was Construed below it was not the Statute on Which the Indictment was Founded (Section 37 CR. C.) but the Claims Statute (Section 35 CR. C.)

This Court's jurisdiction under the Criminal Appeals Act is limited to the review of a decision "sustaining a demurrer to any indictment, * * * where such decision is based upon the * * * construction of the statute upon which the indictment is founded." (18 U. S. C. A. Section 682). The indictment herein charges a conspiracy under Section 37 of the Criminal Code (18 U. S. C. A. Section 88) to violate Section 35 of the Criminal Code (18 U. S. C. A. Section 80), the False Claims Statute (R. 7, 19). An examination of the Government's brief shows that it makes no contention that Section 37, the general conspiracy statute, was misconstrued, its argument being devoted to a demonstration that Section 35 of the Criminal Code, the False Claims Statute, has been misconstrued (Government's brief, pages 7, 9).

We do not believe this brings the case within the statute. The Criminal Appeals statute requires a construction of the statute "upon which the indictment is founded." The in-

dictment herein is founded not upon Section 35 but upon Section 37. The proof of this is that if the defendants were convicted they could only be given the sentence provided for under Section 37, a maximum of two years and a $10,000 fine instead of the sentence provided for under Section 35, a maximum of ten years and a $10,000 fine.

This Court has held that the Criminal Appeals Act is "an innovation in criminal jurisdiction in certain classes of prosecutions, which cannot be extended beyond its terms" (*U. S.* v. *Dickinson*, 213 U. S. 92). Following this norm of construction this Court has consistently refused to extend the scope of review provided for in the Act holding that an appeal does not open the entire case for review (*U. S.* v. *Keitel*, 211 U. S. 370, 398; *U. S.* v. *Hastings*, 296 U. S. 188, 192); that no appeal lies where the decision of the District Court is based upon an independent non-appealable ground (*U. S.* v. *Hastings*, 296 U. S. 188, 192-194); and that where the grounds of the ruling below are ambiguous the doubt will be resolved against this Court's jurisdiction (*U. S.* v. *Carter*, 231 U. S. 492-494; see also *U. S.* v. *Halsey, Stuart & Co.*, 296 U. S. 451). In the face of these decisions it seems a clear extension of the Act to construe it to apply to a decision wherein the Court construes not the statute on which the indictment is founded (here the conspiracy statute) but another statute entirely.

It is a matter of some wonder to counsel herein that this question seems never to have been raised. Counsel have examined what we believe to be all of the reported cases coming to this court under the Criminal Appeals Act and have found no case wherein this Court has specifically passed on the present question or wherein it has even been raised by counsel. It is true that this Court has passed upon cases arising under the Criminal Appeals Act which were almost identical with the present case, wherein upon a charge of conspiracy under Section 37, this Court has construed a secondary statute which the defendant is al-

leged to have conspired to violate.[1] Still this practice though acquiesced in over a period of time is not authoritative if there is a clear lack of a statutory grant of power. A crime being denounced by the statute which creates it and by no other (*U. S.* v. *Scharton* 285 U. S. 518), an indictment would seem to be "founded" upon the statute creating the crime and no other. And if this statute is not construed it would seem an end of the matter.

II

The Court Below Has Construed the Indictment, Not the Statute

Aside from Point 1, we do not believe that the Court below has construed a statute, either Section 37 or Section 35. Inasmuch as under *U. S.* v. *Cohn*, 270 U. S. 339, 345-346, a conspiracy to violate Section 35 of the Cr. Code must in-

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[1] These cases are:

U. S. v. *Bowman*, 260 U. S. 94;
U. S. v. *Walter*, 263 U. S. 15, both involving Sec. 35 Cr. C., the False Claims Statute;
U. S. v. *Stevenson*, 215 U. S. 200 (Immigration Laws);
U. S. v. *Biggs*, 211 U. S. 507 (Timber and Stone act);
U. S. v. *Keitel*, 211 U. S. 370; *U. S.* v. *Munday*, 222 U. S. 175; *U. S.* v. *Forrester*, 211 U. S. 399, and *U. S.* v. *Herr*, 211 U. S. 406 (all involving Land Entry Laws);
U. S. v. *Holte*, 236 U. S. 140 (the White Slave Act);
U. S. v. *Morehead*, 243 U. S. 607 (Homestead law);
U. S. v. *Hutto*, 256 U. S. 524 (Homestead law);
U. S. v. *Janowitz*, 257 U. S. 42 (violating section 148 of the Cr. code relating to fraudulent alterations of United States obligations);
U. S. v. *Davis*, 231 U. S. 183 (involving conspiracy to violate sections 28 and 29 of the Penal Code pertaining to the making of false affidavits);
U. S. v. *Ferger*, 250 U. S. 207 (Forgery of Bill of Lading);
U. S. v. *Foster*, 233 U. S. 515 (Conspiracy to defraud or to violate Postal Laws);
U. S. v. *New South Farm and H. Company*, 241 U. S. 64 (Conspiracy to violate Mail Fraud Statute).

The cases involving conspiracies to violate the Anti-Trust laws are not in point since those laws have their own conspiracy provisions. Thus, *U. S.* v. *Patten*, 226 U. S. 525; *U. S.* v. *Pacific & Arctic R. and Nav. Co.*, 228 U. S. 87, and *U. S.* v. *Winslow*, 227 U. S. 208 do not silently support the contention that construction of an auxiliary statute can be the basis of jurisdiction.

volve a pecuniary fraud (defrauding the Government as to its governmental functions as in *Haas* v. *Henkel*, 216 U. S. 462, 479, being insufficient) the alleged misrepresentation must relate to a material fact tied up with a possible monetary loss to the government. The Court below has simply held, rightly or wrongfully, that there was no such possible monetary loss under the facts alleged in the indictment, and as that court's construction of the indictment is binding on this Court[1] no question of the construction of a statute is here for review.

Obviously, there has been no construction of Section 37, the general conspiracy statute, or even of Section 35, the claims statute, in any real sense of the word, in holding that under the facts stated in the indictment there was no possibility of a pecuniary loss to the government. It is as if in a first degree murder indictment the words "with malice aforethought" were omitted. Quashing such an indictment would not construe a statute denouncing murder because the inquiry would not be what the statute denounced, but whether, without the claim of premeditation and malice aforethought the facts alleged in the indictment amounted to murder. In the same way, the present inquiry is not as to what the False Claims statute means; this Court has already decided what it means in *U. S.* v. *Cohn, supra;* it means that a financial fraud must be involved. That meaning the court below has taken directly from this Court and has simply held that the facts alleged in the indictment show no possibility of pecuniary loss to the government. The lower court has added nothing to nor subtracted anything from this Court's construction of Section 35; the meaning of that section is the same now as it was prior to the decision below. It could have arrived at its decision without even reading Section 35 once it concluded from this

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[1] See *U. S.* v. *Hastings*, 296 U. S. 191, 192; *U. S.* v. *Yuginovich*, 256 U. S. 450, 461; *U. S.* v. *Colgate & Co.*, 250 U. S. 300; *U. S.* v. *Davis*, 231 U. S. 183.

Court's decision in *U. S.* v. *Cohn*, supra, that Section 35 involved a pecuniary loss alone.

We are aware of statements in some of this Court's decisions that where the district court has held that the acts charged do not fall within the condemnation of the statute the court below has necessarily construed the statute and the appeal lies. (See *U. S.* v. *Patten*, 226 U. S. 525, 535; *U. S.* v. *Birdsall*, 233 U. S. 223, 230; *U. S.* v. *Nixon*, 235 U. S. 231, 236; *U. S.* v. *Mosley*, 238 U. S. 383; *U. S.* v. *Cohn*, 270 U. S. 339, 342-343). Thus in *U. S.* v. *Patten*, supra, a broad statement appears that "it seems a solecism to say that the decision that the acts charged are not within the statute is not based upon the construction of it." (*U. S.* v. *Patten*, 226 U. S. 534, 535.) But this broad statement like other broad statements must be restricted to the facts in that particular case. The court laid before itself on the one hand the facts alleged in the indictment (a Sherman Act case), and on the other the statute. The question was whether the statute denounced the particular acts charged, i.e., whether the statute included them or not. The inquiry was as to the meaning of the statute, how far it went, whether it applied to the particular acts charged. Necessarily, the construction of the statute was involved. So, too, in *U. S.* v. *Birdsall*, 233 U. S. 223-230, this Court said:

> "As the District Court held that the acts charged did not fall within the condemnation of the statute, the Court necessarily construed the statute, and the cases are properly here."

In that case the defendant was charged with having given bribes to two Government Indian Agents to get them to advise a United States Judge as to a reduction of a sentence. As the indictment alleged that the money was given with intent to influence their "official" action, the question was whether the action to be influenced was an "official" action within the meaning of the bribery statute. This required

an examination of the bribery statute to ascertain whether under it an "official" action must be prescribed by statute or whether it was sufficient if it was governed by a lawful requirement of the executive department of the government. The object, therefore, was the ascertainment of the meaning of the statute, not, as in the present case, whether certain facts amounted to a violation of a statute whose meaning had already been ascertained.

In *U. S.* v. *Nixon*, 235 U. S. 231, a receiver of a common carrier was indicted for shipping livestock from a quarantine state to another. A statute of 1905 prohibited such transportation by a railroad company. As a receiver was not a railroad company the court, applying the 1905 Act, quashed the indictment on this ground. However, it turned out later that the Act of March 4, 1913 made the provisions of the 1905 Act apply not merely to railroads but to all common carriers, which this Court held included the Receiver of a railroad. In passing upon the criminal appeal this Court held that a statute upon which an indictment is founded may be construed not only by misinterpreting its language but by overlooking its existence and failing to apply its provisions to an indictment which sets out facts constituting a violation of its terms (page 235-236). This Court said:

> "When he sustained the demurrer on the ground that the shipment therein stated did not constitute a crime of which the receivers could be convicted, he in legal effect held that they were not liable to prosecution if, while operating a road as common carriers, they hauled livestock from a quarantine state to another. In rendering that decision he made a ruling of the very kind which the United States was entitled to have reviewed under the provisions of the Criminal Appeals Act" (page 236).

Again, we say that the inquiry was as to the meaning of the 1913 amendment to the 1905 statute, i.e., whether "com-

mon carrier" in the 1913 amendment included the receiver of a railroad. In this way there was a clear construction of the statute.

In *U. S.* v. *Mosley*, 238 U. S. 383, 385, this Court stated:

> "The demurrer was sustained by the District Court on the ground that the section did not apply to the acts alleged. As the judgment on the face of it turned upon the construction on the statute, the United States brought the case to this Court." (page 385)

The four counts of the indictment alleged a conspiracy to injure and oppress voters in an election for a Member of Congress in violation of Section 19 of the Cr. Code. To that end the defendants agreed to omit the precinct returns from their count and from their returns to the State Election Board. The decision shows that the question was whether the repeal of the Act of February 8, 1894, by implication withdrew offenses committed by election officers from the scope of Section 19 of the Cr. Code. A clear case of the construction of Section 19 was therefore involved.

In *U. S.* v. *Cohn*, 270 U. S. 339, the defendant was indicted for a violation of Section 35 of the Cr. Code, the False Claims Statute, discussed herein. The indictment was dismissed below on the ground that the statute did not make the matters charged a crime against the United States (page 342). The indictment charged that the defendant caused false and fraudulent statements to be made with reference to a shipment of cigars from the Philippine Islands. The decision of this Court turned upon the construction of the words "claim upon or against" the Government within the meaning of the statute, i.e., as to whether obtaining the possession of non-dutiable merchandise was obtaining the approval of a claim within the meaning of the statute. This Court construing Section 35 of the Cr. Code held that obtaining the approval of a "claim upon or against" the Government related solely to the approval of

a claim for money and did not relate to the entry and delivery of non-dutiable merchandise. This was manifestly a construction of the statute.

We think, therefore, that statements by this Court in the various decisions above cited that a holding that the indictment does not state facts within the condemnation of the statute necessarily involves a construction of the statute must be restricted to the particular cases involved in which, in every instance, it will be found the statute was actually construed upon a dispute as to its meaning. The real inquiry in these cases was exactly the converse of whether the acts charged came within an already ascertained statute; it was whether the statute, attempted to be applied to a new state of facts, covered the acts charged. This necessarily involved a construction of the statute. In the present case there was no dispute below as to the meaning of the statute, the court below having followed this Court's decision in *U. S.* v. *Cohn*, supra, that Section 35 must involve a pecuniary fraud and did not condemn a non-pecuniary fraud. The court below has simply held that if any fraud was alleged in the indictment it was non-pecuniary in character and therefore not within the scope of the statute. If there had been any dispute below revealed by the court's decision to the effect that Section 35 denounced a non-pecuniary fraud and a dispute here on this point, the construction of a statute might in fact be involved, but this is not the case. On the contrary, the meaning of the statute is conceded, both below and here, as to the necessity of a pecuniary fraud, and the only dispute is as to whether the facts alleged constitute a pecuniary fraud. This is not a construction of the statute.

That the lower court's decision was based upon its conclusion that, the AAA Act being unconstitutional, the facts alleged in the indictment involved no possibility of a pecuniary loss to the Government is clear from an analysis of its decision. The alleged false representation is that the

hogs were the hogs of various producers when in fact they were the defandants' (p. 20). The court said:

> "There is no contention that the hogs were not shipped and that the bills * * * were not correct bills, with the exception that the hogs did not originate from the sources represented by the defendants.
>
> "This ceases to be a material fact, if the provisions of the Agricultural Adjustment Act are void." (R. 20)

Boiled down, this means that the Government got the right price but the wrong hogs. But if it could do nothing under the AAA Act, even with the *right* hogs, it has sustained no *pecuniary* loss in getting the wrong ones. There is nothing in the indictment alleging the Government paid more than its own price for the hogs it got. Even assuming the phrase "premium prices" in the indictment (R. 9, 10, 11) (a bare conclusion discountenanced in *U. S.* v. *Cruickshank,* 92 U. S. 542) brings in the whole Agricultural Adjustment Act and all the Regulations, still we say there is no sufficient showing in the indictment that the Government paid more for the hogs than the market price. In any event this must have been the view of the court below and if so the question is not open here, the lower court's construction of the indictment being conclusive (*U. S.* v. *Hastings,* 296 U. S. 191, 192, and cases cited, supra).

It follows that the Court below, adopting this Court's own ruling in *U. S.* v. *Cohn,* supra, that Section 35 embraces pecuniary frauds only, has held that the indictment herein does not charge a pecuniary loss, or the possibility of it. Rightly or wrongly the court below has thus construed the indictment and not the statute and this Court has no jurisdiction under the Criminal Appeals Act.

III

Assuming the Jurisdiction, the Only Question Involved is Whether the Alleged Misrepresentation was as to A Material Matter, as to Which the Government's Authorities are Unconvincing.

Assuming that the court below has construed the statute within the meaning of the Criminal Appeals Act, the question here is not the broad question of the quasi-validity of Governmental Acts under an unconstitutional statute, but the narrow inquiry as to what is a misrepresentation of a material fact. Here again we are met with an obstacle when trying to find the construction of a statute for Section 35 says nothing about a material fact. The necessity that the misrepresentation denounced by Section 35 should refer to a material fact is not a requirement of Section 3 but of the general criminal law, which decrees, *in favorem libertatis,* that no man shall be imprisoned for a false representation unless it relates to a material fact. It requires, we think, a wider construction of the Criminal Appeals Act than allowable to construe its grant of power to a case wherein the inquiry is not the meaning of a statute but whether a requirement of the general criminal law that the misrepresented fact shall be material is met by the particular misrepresentations of the particular indictment.

But assuming that the inquiry is permissible, was the misrepresentation as to the source of the hogs the misrepresentation of a material fact? Certainly cases like *U. S.* v. *McDonald,* 10 Fed. Sup. 948, do not answer the inquiry. The offense there involved was not a conspiracy to make a false representation as to a material fact in violation of Section 35 Cr. C. but apparently a straight conspiracy to defraud under Section 37. The allegations of that particular indictment may have made out a good charge of fraud—we do not know, as we do not have the indictment before us. It may well be, as the Court says,

that those who conspire to sell hogs to the Government, falsely representing that they are entitled to the benefits of the Act, and who thus get money from the public treasury, have committed a crime. As the court says, because money cannot constitutionally be paid out to a favored class, it does not follow that others who falsely represent themselves as of that class, and thus enrich themselves at public expense, should go unpunished. We may admit all this, but how does this help us to determine whether a false representation as to the origin of the hogs, *under the allegations of the present indictment as that indictment has been construed below,* relates to a material matter when the legislative program based on the origin of the hogs is unconstitutional? The Court's decision in *U. S.* v. *McDonald,* supra, seems to deal with the question on the basis of the existence or non-existence of a legal crime or even a moral wrong, but even so it discusses the legal crime of a conspiracy to defraud under *Section 37,* not a conspiracy under Section 37 to make a false representation as to a material matter under *Section 35.*

Cases like *Madden* v. *U. S.,* 80 Fed. (2d) 672 and *U. S.* v. *Seelig and Mesch Company,* (S. D. N. Y. Appendix Gov. Brief) are not in point: the Government would always have a qualified title to moneys in its possession, no matter how it got them. *Langer* v. *U. S.,* 76 F. (2d) 817, 824-825 holds that upon a charge of conspiracy corruptly to administer the FERA and NRA Acts, the gist of the offense is the conspiracy. The Court held, without giving reasons, that it did not matter whether the Acts are unconstitutional or not. *U. S.* v. *Harding,* 81 F. (2d) 563, simply follows the *Langer* case, remarking, as in that case, that the claim of unconstitutionality of the Act as a defense was in the nature of a collateral attack. The Court said that the ultimate object of the conspiracy was to obtain moneys the defendants would not otherwise get except for their own unlawful acts and so if they received the moneys it could hardly be

contended their receipt was lawful, whether Congress had or had not the right to pass the Act. These decisions are poles apart from the narrow question herein: that the Court below having held that the facts charged in an indictment do not involve a pecuniary fraud under a statute which requires one, a misrepresentation as to a matter beyond the control of Congress was not material.

As to *U. S.* v. *Soeder*, 10 F. Supp. 944; 947, this case holds that upon an indictment under Section 37 for conspiracy to defraud, by misrepresenting the origin of hogs, defendants are estopped to deny the validity of regulations they pretended to observe. As this was a direct conspiracy under Section 37 no question of materiality of an alleged false representation was involved. As to *U. S.* v. *Schor*, 13 F. Supp. 399, the question there was whether "any matter within the jurisdiction of any department or agency of the United States," was involved, the false vouchers, the defendants claimed, being filed with the Triborough Bridge Authority. The case turned on this point alone.

We do not think any of the above cases are helpful. As we have said before the sole question here is whether the Court below having held that the facts charged in an indictment do not involve a pecuniary fraud under a statute held by this Court to require one, does an alleged misrepresentation as to a matter beyond the control of Congress relate to a material matter? We think clearly it cannot, that a material misrepresentation would have to relate to a possible financial loss and that as this has been foreclosed by the lower Court's construction of the indictment, this Court has no power to come to any different conclusion. In this light no question of estoppel can arise. The Court below having judicially noticed the unconstitutionality of the AAA statute one of the facts alleged to be part of the fraud vanished from the case and left, according to the Court below, only the allegations as to whether the hogs were shipped and the bills were correct. As the Court below held there were no

contrary claims in the indictment, the misrepresentations as to the origin of the hogs ceased to be material and the order sustaining the demurrer because the indictment alleged no element of pecuniary fraud necessarily followed.

CONCLUSION

The appeal herein should be dismissed or the judgment below affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 97.—October Term, 1937.

The United States of America, Appellant, *vs.* Ben Kapp, Bert Cox, Tom Woods, etc., et al.	Appeal from the District Court of the United States for the Western District of Oklahoma.

[December 6, 1937.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This case comes here under the Criminal Appeals Act. 18 U. S. C. 682.

The second count of an indictment charged appellees with conspiracy to defraud the United States by furnishing false information and making false statements to the Secretary of Agriculture in order to secure benefit payments under the Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31; Criminal Code, secs. 35, 37; 18 U. S. C., secs. 80, 88. The District Court sustained a demurrer to this count and the Government appeals.

The contention of the Government is that the appellees conspired to cheat the United States by selling hogs to the Government at premium prices through misrepresentation as to the identity of the producers of the hogs sold and the continued ownership by such producers. Appellees' demurrer went upon the ground, among others, that the provisions of the statute and the regulations of the Secretary of Agriculture to which the count referred are void (*United States* v. *Butler*, 297 U. S. 1) and that the acts set forth in the indictment do not constitute an offense against the laws of the United States.

The false claims statute under which the prosecution was brought penalizes one who "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States . . . shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false statements or representations" (Criminal Code, sec. 35). After referring to the statute, the District Judge said in his opinion:

"The overt acts charged, which would be material in this count, are that hogs were shipped under the representation by the de-

fendants that they were the hogs of various producers when in fact the hogs belonged to one or more of the defendants.

"There is no contention that the hogs were not shipped and that the bills, which were made to Armour and Company and other processors, were not correct bills, with the exception that the hogs did not originate from the sources represented by the defendants.

"This ceases to be a material fact, if the provisions of the Agricultural Adjustment Act are void. In other words, the representations, which are alleged to have been made, cease to be misrepresentations of material facts when the act itself falls".

1. Appellees contend that if any statute was construed, it was not the statute on which the indictment is founded and hence that this Court has no jurisdiction. The point is that the indictment charged a conspiracy under Criminal Code, section 37. But the conspiracy charged is one to violate the false claims statute, Criminal Code, section 35. In similar cases the jurisdiction of this Court has been sustained. The statute, at the violation of which the conspiracy is aimed, has been treated as the statute upon which the indictment is founded within the meaning of the Criminal Appeals Act. *United States* v. *Bowman*, 260 U. S. 94, 95; *United States* v. *Walter*, 263 U. S. 15, 16, 17. See, also, *United States* v. *Keitel*, 211 U. S. 370, 387.

2. Appellees contend that the court below construed the indictment and not the statute. *United States* v. *Colgate & Co.*, 250 U. S. 300, 306; *United States* v. *Hastings*, 296 U. S. 188, 192. The argument is that a conspiracy to violate section 35 must involve a pecuniary fraud. *United States* v. *Cohn*, 270 U. S. 339, 345, 346. In that view appellees urge that the court below has simply ruled that there was no pecuniary loss under the facts alleged. But the District Court found no flaw in the indictment as a pleading. Nor does the court appear to have considered the question of pecuniary loss. The court rested its decision upon the point that the facts alleged in the indictment with respect to the identity of the producers of the hogs, or the sources from which the hogs originated, had ceased to be material because of the unconstitutionality of the provisions of the Agricultural Adjustment Act. This did not purport to be a construction of the indictment but a ruling that the indictment in view of the invalidity of that Act failed to state an offense. The substance of the decision thus appears to be that the false claims statute does not apply to an attempt to defraud

the United States by obtaining the approval of claims and benefit payments through false representations, if the statute providing for such claims and payments is found to be invalid. That is clearly a construction of the statute. *United States* v. *Patten*, 226 U. S. 525, 535; *United States* v. *Birdsall*, 233 U. S. 223, 230.

3. Such a construction is inadmissible. It might as well be said that one could embezzle moneys in the United States Treasury with impunity if it turns out that they were collected in the course of invalid transactions. See *Madden* v. *United States*, 80 F. (2d) 672, 674. Appellees were not indicted for a conspiracy to violate the Agricultural Adjustment Act but for a conspiracy to violate the statute protecting the United States against frauds. It is cheating the Government at which the statute aims and Congress was entitled to protect the Government against those who would swindle it regardless of questions of constitutional authority as to the operations that the Government is conducting. Such questions cannot be raised by those who make false claims against the Government. See *Langer* v. *United States*, 76 F. (2d) 817, 824, 825; *Madden* v. *United States, supra*; *United States* v. *Harding*, 81 F. (2d) 563, 568; *United States* v. *MacDonald*, 10 F. Supp. 948.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.